

No. 16-1186

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES G. PAULSEN, Regional Director of Region 29 of the
National Labor Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

CSC HOLDINGS, LLC and CABLEVISION SYSTEMS CORP.

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT
NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR PETITIONER-APPELLANT
NATIONAL LABOR RELATIONS BOARD

I. STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction in the underlying case pursuant to § 10(j) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(j). On March 8, 2016, the district court, Judge Denis R. Hurley, United States District Court Judge for the Eastern District of New York in Case No. 15-cv-07054, issued a final order denying the Regional Director’s (“the Director”)

petition for a temporary injunction under § 10(j). (SPA28.)¹ The Director filed a timely notice of appeal from this final order on April 19, 2016. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

II. STATEMENT OF THE ISSUES

1. The district court found insufficient evidence that Cablevision's termination of Dorothea Perry was unlawful under the Act, despite evidence of Perry's open protected concerted and union activity, evidence of the Company's knowledge and union animus, and pretextual justifications. In doing so, the court made independent credibility determinations and failed to give proper deference to the Director's theory of the case. Did the court err in finding no likely violation?

2. Discrimination against union activists is recognized as having an inherent chilling effect on employees' support for unions. This "chill" is already manifesting among Cablevision's employees. Did the court abuse its discretion in refusing to order interim reinstatement for Perry to prevent this irreparable harm?

III. STATEMENT OF THE CASE

The Director filed a petition for a temporary injunction under § 10(j) seeking interim remedies, including reinstatement and a cease and desist order, pending Board adjudication of an administrative complaint. On March 8, 2016,

¹ "JA" references are to the Joint Appendix filed with the Board's brief; "SPA" references are to the Special Appendix; "Add." references are to the decision of the Administrative Law Judge attached as an addendum to this brief.

Judge Denis R. Hurley, United States District Court Judge for the Eastern District of New York in Case No. 15-cv-07054, denied the Director's petition. The Director appeals from that denial.

A. Background: After a Cablevision Facility was Organized by the Union, Cablevision Engages in an Aggressive Multi-Year Campaign to Prevent Employees at its Other Facilities from Organizing

CSC Holdings, LLC and Cablevision Systems Corp. (collectively “Cablevision” or “the Company”) is a major provider of cable television and telecommunications services in various parts of the United States, including the Greater New York area. (JA364–72, JA579–583.) Cablevision operates multiple facilities in various locations including Jericho, Melville, Woodbury and Brooklyn, New York. (JA50, JA156.) On February 7, 2012, Communications Workers of America (“the Union”) successfully organized a unit of Cablevision's service technicians at its Brooklyn, New York facility. The Union has continued its attempts to organize nearby facilities. Since that time, the Company—led by Cablevision CEO James Dolan—has actively opposed its employees' efforts to unionize, resulting in numerous unfair labor practice charges currently pending before the Board. (JA60.) *See CSC Holdings, LLC*, 2014 WL 6853881 (NLRB Div. of Judges, Dec. 4, 2014); *see also CSC Holdings, LLC and Cablevision Systems*, 2016 WL 15800001 (NLRB Div. of Judges, Apr. 19, 2016). As part of the Company's anti-Union campaign, the Company held several meetings with

employees at its Greater New York area facilities, including a call center located in Jericho, New York. (*Id.*) At one of the meetings in Jericho in 2012, the Company played employees a video address of CEO Dolan, in which Dolan told employees, among other things, that employees should feel free to contact him personally with any problems or concerns. (JA61.) Dolan also used the video to inform Technical Support Representatives (“TSRs”) that the Company would no longer utilize the same metric it had been using to evaluate TSRs.

TSRs are the Company’s customer service representatives and handle incoming calls from the Company’s customers to address and attempt to resolve their various issues regarding the Company’s cable, internet, or telephone services. (JA50–51, JA203.) The Company has historically used a variety of metrics to evaluate TSR job performance. (JA54–55, JA205.) The Company notified TSRs of their performance metrics during monthly one-on-one meetings with their direct supervisor and through annual performance appraisals. (JA54, JA55, JA230.)

B. Dorothea Perry, an Employee at the Company’s Jericho Call Center, Makes Complaints About Working Conditions to Cablevision CEO James Dolan

Dorothea Perry began working for the Company as a part-time temporary TSR at the Jericho call center in January 2004. (JA50.) Perry was converted to a permanent employee in June 2004. (*Id.*) Following up on Dolan’s February 2012 invitation to e-mail employment concerns to him directly, Perry sent Dolan an e-

mail on February 28, 2012 stating that she believed that “unions should not be necessary” but that the conditions for her coworkers made her believe that “the consideration of unionization might be warranted.” (JA50, JA435–36.) One of the Company’s Human Resources (HR) representatives replied to Perry’s February 2012 e-mail stating that someone else in HR would follow up with Perry, however no one ever contacted her nor did she try to further pursue the concerns she had raised to Dolan. (JA62, JA438.) There is no evidence that Perry’s February 28, 2012 e-mail resulted in an HR investigation into her work performance.

Perry’s recent performance with the Company was recognized as “exceptional” in both her 2013 and 2014 annual appraisals. (JA58, JA432–33, JA553–57, JA853–59.) The Company routinely rewarded Perry with performance-based wage increases connected to her annual performance appraisals. (JA58.) Between 2014 and 2015, the Company’s president issued several “Thank You” cards to Perry in recognition of her “exceptional customer service” and “extraordinary work.” (JA59, JA432–33.) Prior to her June 8, 2015 discharge, Perry had been discipline-free for over four years. (JA58, JA114, JA759–60.)

In early 2015, the Company introduced a new set of performance metrics for TSRs including a measurement call Net Promoter Score (“NPS”), based on a Company initiative labeled “Voice of the Customer” (“VOC”)—a survey sent to customers asking them to rate their interaction with TSRs on a scale of 0 to 10.

(JA55, JA191–92, JA204–06, JA237, JA953–56.) A rating of 9 or 10 on the survey would reflect positively on a TSR’s NPS score, while marks below 6 would factor negatively into NPS scores. (JA205.) By May 2015, Perry and her coworkers began discussing concerns about their job security raised by the implementation of NPS and the recent termination of a fellow employee. (JA63–65.) Employees believed that the NPS was essentially a reintroduction of a different metric that the Company had eliminated in 2012. (*Id.*) Perry and her coworkers began discussing the idea of joining a union in order to protect themselves from the Company’s evaluation practices, which they viewed as unfair. (*Id.*)

On May 11, 2015, Perry sent another e-mail to Dolan raising the concerns she and her coworkers had discussed. (JA440–43.) In her e-mail, Perry mentioned several complaints she and her coworkers had, including the perceived reimplementations of the old metric eliminated in 2012 through the NPS evaluation system, perceived unfairness regarding how VOC-based metrics were being used against employees, and a new computer-based timekeeping system that employees believed was forcing them to perform unpaid work. (*Id.*) Perry wrote that she and her coworkers believed that NPS was an unjust method of evaluating TSR performance because it had little bearing on how TSRs actually performed call-handling with customers. (JA129, JA137–38, JA204–05, JA440–43, JA953–56.)

Perry's e-mail to Dolan went on to state that "the low whispers of unionization have begun in the department because the staff is feeling less secure in their positions," and she warned that the suffering employees felt because of the perceived unfairness of the Company's practices are "what makes the whispers of 'unionization' become a reality." (JA440–41.)

C. In Response to Perry's E-mail to Dolan, Cablevision Senior Management Immediately Investigates Perry's Work History and Performance

Perry sent her e-mail to Dolan on May 11 at 2:13 P.M. (*Id.*) At 2:24 P.M., Perry's e-mail was forwarded from Dolan's e-mail account to Executive Vice President of Human Resources Sandy Kappell, who in turn forwarded it to Senior Vice President of Human Resources Paul Hilber at 2:29 P.M. with instructions to "get us the facts." (JA493–497.) Hilber then forwarded Perry's e-mail to Regional HR Director Yvette Panno, with an instruction to "Please have this investigated immediately." (JA493.)

During the afternoon of May 11, after receiving Perry's e-mail to Dolan, Panno began investigating all aspects of Perry's employment with the Company for the purpose of creating an "escalation summary"—a document that records information about an employee to be given to the Company's senior management. (JA157, JA160, JA168, JA171.) Perry directed Milton Lopera, the Director of Operations at the Jericho call center, to pull performance metrics for Perry and

records of performance coaching that Perry received. (JA158–59, JA505, JA507–13.) Panno specifically asked for a summary of Perry’s “Outlier Performance”—those metrics where Perry scored significantly below her peers. (JA221, JA505.) Panno also gathered information regarding Perry’s performance rankings relative to her peers and asked HR manager Francesca Prochazka to speak with call center Supervisor Valmiki Mohip regarding Perry. (JA160, JA164, JA515, JA535.) Panno also instructed the Company’s disability analyst to pull Perry’s medical leave records and, after obtaining a summary of various medical accommodations Perry had been granted, Panno asked the disability analysts whether the Company could “revisit” any of those accommodations. (JA157, JA161, JA499, JA519–21.) Panno even requested that Prochazka speak to Perry’s manager, Gilbert Vega, about complaints that Perry had made about Company-provided food at a work event. (JA157, JA501.)

The next day, on May 12, Prochazka reported to Panno regarding what Mohip knew about Perry’s intentions to write to Dolan, and included in her report that Mohip believed that Perry might write another message to Dolan. (JA535.) Prochazka also reported to Panno that she advised Mohip to always let HR or higher-level management know immediately when “issues like this” arise. (*Id.*) Vega also informed Mohip of Perry’s e-mail to Dolan, warning Mohip that he must tell Vega when Perry is going to engage in such conduct. (JA194, JA585.) Mohip

later told Perry that her e-mail had made the Company's management "very nervous" and instructed Perry to tell him before she sent Dolan another e-mail.

(JA75.)

Although Perry did not tell anyone at the Jericho call center about her e-mail to Dolan, the word spread quickly. (*Id.*) Numerous employees expressed appreciation to Perry for having the courage to relay their workplace concerns to Dolan; one employee told Perry "I salute you" while making a bowing gesture.

(*Id.*)

D. Perry Reaches Out to the Union to Begin Organizing Employees at the Jericho Call Center

At around the same time as her May 11 e-mail to Dolan, Perry reached out to the Union to inquire about how employees at her workplace could form a union. (JA70, JA72.) Perry spoke to Union organizers Tim Dubnau and Zelig Stern, who advised Perry that the Union was planning organizing meetings with Cablevision employees from other Cablevision call centers. (*Id.*) Stern and Dubnau invited Perry to the meetings and asked her to speak with her coworkers and encourage them to get involved with the Union. (*Id.*)

After her discussions with the Union, Perry began organizing employees at the Jericho call center. During nonworking time, Perry advised her coworkers that she had contacted the Union, provided coworkers with contact information for the Union organizers, and encouraged employees to attend organizing meetings that

the Union had planned for workers at other Cablevision call centers in New York. (JA72–73, JA88–89.) Perry also collected employees’ e-mail addresses and updated them about the Union organizing efforts. (*Id.*) Perry’s efforts were assisted by TSR supervisor Anthony Maharaj, who helped Perry secure names of employees interested in the Union. (JA77.) According to the Union, Perry quickly became the “point person” for its nascent organizing campaign at the Jericho call center. (JA73, JA148–50.)

E. The Company Continues Investigating Perry

On May 18, 2015, Panno invited Perry to meet with her in the HR office at the Jericho call center. (JA65, JA445–46.) Panno, who was meeting Perry for the first time, began the meeting by introducing herself and thanking her for writing the May 11 e-mail to Dolan. (JA65.) Panno said that the May 11 e-mail had brought to her attention “some things she was not aware of.” (*Id.*)

During the meeting, Perry told Panno that employees were worried for their jobs because of unfair treatment by management, particularly the use of VOC in employees’ NPS scores. (JA66.) Perry explained to Panno that she wrote her May 11 e-mail to Dolan in order to express the fear and concern that her coworkers had over the use of NPS scores. (*Id.*) Panno responded that the Company did not believe a union would be good for employees because it would only serve as an impediment between employees and the Company and that the Union would not

protect employees against the new performance metrics. (*Id.*) Panno asserted that the unionized employees at the Brooklyn facility were subject to the same NPS evaluations as employees at the Jericho call center. (*Id.*) Panno further stated that Brooklyn employees were trying to decertify the Union. (*Id.*) Perry responded that she had prior experience working with unions and she believed that a union would be beneficial and help employees at the Jericho call center. (*Id.*)

Perry continued discussing employees' concerted complaints regarding the perceived unfairness of NPS in evaluating their performance. (JA67.) Panno responded that the Company supported NPS and wanted to continue advancing it as a key performance metric. (*Id.*) Panno asked Perry if she had received any training on NPS, and Perry responded that she had not. Perry explained that she had inadvertently visited one NPS training session for a brief period. (*Id.*) Perry also told Panno that she had taken an online training course regarding NPS but that the course was ineffective, and Perry still did not fully understand how the Company was using NPS. (JA68.) Perry added that she believed at least half of the employees and many supervisors also did not understand NPS. (*Id.*)

At this point in the meeting, Panno sat back in her chair, looked directly at Perry and said: "I see you as a leader." (*Id.*) Panno continued, and asked Perry if she had attended any focus group meetings that the Company periodically convened to get employees' opinions on various issues or systems that the

Company was implementing. (*Id.*) Perry responded that she had not been invited to any of the focus group meetings, but no number of meetings would change her opinion that the NPS was an inherently unfair system. (*Id.*) At one point during this exchange, Panno told Perry that she had reviewed Perry's performance metrics, and based on her scores and "good" metrics, Panno told Perry that "You get it." (JA70.) At no point during the meeting did Panno tell Perry that there were any problems with Perry's performance or that her performance issues were being reviewed. (JA290–91.) Panno's meeting with Perry lasted over one and a half hours. (JA70.)

After Panno's meeting with Perry, Panno conducted numerous meetings and/or phone calls with the Company's senior executives, including Hilber, Senior Vice President of Contact Center Operations Lisa Gillingham, and the Company's in-house attorney Rochelle Noel. From the period of May 11 thru June 8, 2015, Panno spent approximately 20 hours on her investigation of Perry. (JA287–89.) Panno's HR team spent additional time investigating Perry during this period. (JA289.)

F. The Company Terminates Perry

On June 1, 2015, Panno e-mailed Gillingham with a recommendation to discharge Perry. (JA1024.) Prior to e-mailing Gillingham her formal recommendation, Panno and Gillingham had discussed the need to terminate Perry.

During that conversation, Gillingham and Panno discussed Perry's comments regarding unions and her e-mail to Dolan; Gillingham could not recall any further details of that conversation. (JA306.) On June 2, Gillingham approved the recommendation to discharge Perry. (JA1024.)

On June 8, 2015, the Company proceeded with Perry's termination. Panno met with John Tucci, the Interim Director of the Jericho call center and discussed the plan to terminate Perry. (JA231, JA244.) Tucci then sent Perry an e-mail asking her to meet with him when she arrived at work that evening. (JA455.) When Perry came into work that evening, she immediately reported to Tucci. (JA94.)

The meeting took place inside a conference room in the HR suite at the Jericho call center. (*Id.*) Tucci, Panno, and Prochazka were present in the room along with Perry. Tucci began by saying that he called the meeting because Perry had some communications with senior management and Tucci wanted to follow up on that. (*Id.*) Perry explained the issues she had raised in the May 11 e-mail to Dolan. (*Id.*) Tucci responded that the Company was terminating Perry's employment because she did not "believe in the direction of the company." (*Id.*)

Perry asked why she was being terminated. She asked whether she had done something bad or whether there was a problem with her performance metrics. (*Id.*) Tucci replied that the discharge had "nothing to do with your metrics" and repeated

that it was because she did not believe in the direction of the Company. (*Id.*)

Perry continued to press Tucci for a better explanation, repeatedly asking him what she had done wrong. Tucci replied that Perry had “used strong words.” (JA95.)

Perry asked Panno and Prochazka if she was being fired because of her e-mail to Dolan, and neither woman responded. (*Id.*) Perry became upset and demanded that Panno and Prochazka explain why she was being terminated. Perry told Panno that she had trusted Panno after their lengthy May 18 meeting and Perry believed that Panno had set her up. (JA95–96.) Perry asked Panno to look her in the eye and tell her why the Company was firing her. (*Id.*) Panno motioned towards Prochazka and two security guards soon entered the room to escort Perry out of the building. (*Id.*)

As security escorted Perry back to her desk to collect her things, Perry was walked through the call center past at least twenty of her now-former coworkers. (*Id.*) Perry, thinking that it might be her last opportunity to speak to her coworkers, yelled a warning “Do not trust James Dolan! Don’t e-mail James Dolan! Do not contact Human Resources! They are not here to help you! If you have any problems, do not say anything or you will be terminated like me!” (JA96.)

G. Perry's Discharge Causes an Abrupt Halt to the Union's Nascent Organizing Campaign at the Jericho Call Center

At the time of Perry's discharge, the Union's organizing campaign was in its infancy, having begun in earnest only several weeks prior in mid-May 2015.

(JA70, JA72, JA37.) Before Perry's termination, approximately seventeen employees had expressed interest in unionizing either to Union agents, Perry, or another employee-organizer. (JA38.) On June 8, the day she was discharged, Perry was in the midst of organizing another Union meeting at a location that would be more convenient for the Jericho call center employees to attend. (JA73.) That meeting never took place. (*Id.*) According to Perry, "once I was terminated . . . everything shut down." (*Id.*) Perry's discharge had an immediate and palpable chilling effect on employees at the Jericho call center. Employees at the Jericho call center were aware of Perry's termination, as Perry was publicly escorted out of the facility by security guards in front of numerous employees. (JA95–96.)

Since Perry's discharge, the Union has completely lost contact with employees who had previously expressed interest in the Union. (JA39.) Union Organizer Stern has repeatedly tried to call and/or e-mail employees with whom he had been in communication before Perry's discharge, but none of those employees have answered his calls or returned his messages. (*Id.*) Even employees who were once enthusiastic supporters of the Union and individuals whom the Union

considered as employee-organizers abruptly backed away from the Union after Perry's discharge. (*Id.*)

Approximately one week after Perry's June 8 termination, Perry's former coworker, Nadine Gyles, went to supervisor Mohip's desk. (JA91.) As Gyles approached, she observed Mohip sitting with Maharaj; as Gyles got closer, Mohip started making repeated "shhh" sounds to Maharaj, eventually saying "Shhh. Nadine's coming." (JA91-92.) Gyles asked Mohip about his "shhh" sounds and Maharaj responding that Gyles "wouldn't want to hear the things [Mohip] was just saying about you." (*Id.*) Gyles asked what Mohip had been saying and Maharaj replied that Mohip said that Gyles was "in cohorts" with Perry and the Union. (*Id.*) Gyles told Mohip to stop saying that because she feared she could be fired if somebody else heard. (*Id.*) Gyles then asked Mohip if Perry had been fired because she engaged in union activity and Mohip responded that from what he understood, Perry's union activity was the reason for her discharge. (JA94.)

H. The Director Issues an Unfair-Labor-Practice Complaint and Seeks Injunctive Relief

On August 24, 2015, the Director issued an unfair-labor-practice complaint alleging that the Company violated §§ 8(a)(1) and (3) of the Act by terminating Perry due to her protected concerted and union activities. This administrative case

was heard by an Administrative Law Judge (“ALJ”) of the Board from September 28-30, and October 1, 7, 8, 28, and 30. (Add. 1.)

On December 10, 2015, based on the unfair-labor-practice complaint, the Director petitioned for temporary injunctive relief under §10(j) of the Act pending completion of the Board’s administrative proceedings against the Company. (JA8–14.) The §10(j) petition alleged that there is reasonable cause to believe that the Company violated §§ 8(a)(1) and (3) by terminating Perry for her concerted and union activities protected by § 7 of the Act. (*Id.*)

The petition also alleged that the Company’s discharge of Perry interferes with employees’ right to exercise their protected rights under the Act and threatened the Board’s ability to issue an effective final remedy. To prevent this irreparable injury to employees’ rights under the Act prior to a final Board order and to preserve the Board’s ability to effectively remedy the Company’s unfair labor practices, the petition sought an interim order requiring the Company, *inter alia*, to cease and desist from engaging in the unfair labor practices alleged in the petition and to offer Perry immediate interim reinstatement.

I. The District Court Denies the Director’s Petition for Injunctive Relief

On March 8, 2016, based on the various briefs, transcripts, and exhibits submitted by the parties, the court denied the Board’s petition for injunctive relief. (SPA1.) The district court first concluded that the Director had failed to establish

that there was reasonable cause to believe that the Company violated §§ 8(a)(1) and (3) as alleged in the petition. (SPA24.) The court concluded that the Director had “not submitted sufficient evidence to demonstrate that anti-union animus was a motivating factor in Perry’s termination.” (SPA22.)

The district court further concluded that it was not just and proper to order the Company to cease and desist from engaging in the conduct that violated §§ 8(a)(1) and (3), in part, because Perry was “not entitled to reinstatement.” (SPA26–27.) In reaching its conclusion, the court focused on the Director’s six-month delay in filing the petition, Perry’s alleged untruthfulness on her initial job application with the Company in January 2004, that “[t]here was barely interest in the union at the time of Perry’s termination,” and that interim reinstatement would only serve Perry and not the public interest. (SPA26–27.)

J. The Administrative Law Judge Finds that the Company Violated the Act by Discharging Perry and Orders Her Reinstatement

On May 20, 2016, the ALJ issued her Decision and Order in the underlying administrative case.² The ALJ found that the Company violated § 8(a)(3) and (1) by discharging Perry because of her protected concerted and Union organizing

² While the ALJ’s decision regarding the underlying unfair labor practices was not part of the original record below, this Court may take judicial notice of it. *See Overstreet v. United Bhd. Of Carpenters*, 409 F.3d 1199, 1203 n. 7 (9th Cir. 2005); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 157 n.3 (1st Cir. 1995). *See also Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37 n.7 (2d Cir. 1975) (relying on ALJ decision issued after district court order).

activity. (Add. 37.) In reaching her decision, the ALJ credited Perry's testimony with regard to the circumstances underlying her May 11 e-mail to Dolan, her nascent activities in support of the Union, her account of her May 18 meeting with Panno and the June 8 meeting where she was terminated, and Perry's testimony that Maharaj gave Perry the names of employees interested in the Union. (Add. 27.) The ALJ fully credited employee Gyles' testimony, finding her to be "in many respects the most credible witness." (Add. 28.) The ALJ generally found the testimony of Tucci "not worthy of belief" and that the blanket denials of Maharaj and Mohip "calls their credibility generally into serious doubt." (*Id.*)

In light of these findings, the ALJ concluded that Perry's discharge was motivated by union animus and the Company's proffered rationale was pretextual, given evidence of disparate treatment and evidence that contradicted the Company's claim of poor performance. (Add. 31–37.) In particular, the ALJ observed that, while Perry's work performance was not exemplary, other employees had worse performance than she did and were neither disciplined nor discharged, and that Perry had recently been described as a "valuable contributor" who sought to improve her performance. (Add. 37.) In light of the fact that the Company presented no evidence that any of those other employees were disciplined and discharged, the only thing that "distinguished Perry from the remainder of this group was that she had the audacity to email CEO Dolan." (*Id.*)

During the administrative proceedings, the Company had also argued that Perry was unfit for reinstatement because she had allegedly violated the ALJ's witness sequestration order and falsified her original job application with the Company in 2004. The ALJ rejected both of these arguments, finding that Perry's conduct—e-mailing her former coworkers during the administrative proceeding—was a “technical and nonprejudicial” violation of the sequestration order, (Add. 38), and that Perry credibly rebutted the Company's claim that she had “falsified” the reason for discharge from her prior employment when she applied to the Company in 2004. (JA103.) The ALJ concluded that the Company had failed to meet its burden to demonstrate that it had fired other employees for this offense when the few examples provided all involved employees concealing their criminal record. (Add. 38–42.) Accordingly, the ALJ found that the Company did not meet its burden in claiming that reinstatement was inappropriate and ordered that the Company reinstate her to her former position. (Add. 37–43.)

IV. STANDARD OF APPELLATE REVIEW

This Court reviews a district court's denial of a § 10(j) injunction under an abuse of discretion standard, “bearing in mind . . . that a ‘judge’s discretion is not boundless and must be exercised within the applicable rules of law or equity.’” *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364 (2d Cir 2001) (quoting *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980)).

V. SUMMARY OF THE ARGUMENT

The district court abused its discretion when it found that the Director did not demonstrate that there was reasonable cause to believe that Cablevision violated §§ 8(a)(1) and (3) as alleged in the petition. To the contrary, there was ample evidence that the Company began a swift, targeted investigation into Perry's work performance after she sent an e-mail to the Company's CEO voicing concerted complaints about the Company's employee evaluation methods and warning of "the low whispers of unionization." Both direct and circumstantial evidence also demonstrated that the Company harbored animus towards Perry's protected activities and knew about her organizing activities on behalf of the Union's nascent campaign at the Jericho call center. Contrary to well-established precedent regarding a district court's role in evaluating evidence in a § 10(j) proceeding, the court failed to give proper weight to the Director's evidence and abused its discretion by resolving credibility disputes and conflicting evidence in the Company's favor in concluding that Perry was terminated for her performance rather than her protected concerted and union activity.

The district court further abused its discretion when it denied the Director's request for an injunction ordering interim reinstatement for Perry. The court's decision indicates a profound misunderstanding of the public interest that § 10(j) was designed to protect. The court failed to recognize that the discharge of the

Union's primary employee activist during the infancy of the campaign threatens irreparable harm to employees' willingness to engage in statutorily protected activity. Absent immediate reinstatement, by the time the Board issues an order, it will be too late for the Union to regain its lost support, and the Company will have unlawfully achieved what it sought—a union-free workforce. Indeed, the court wholly ignored the Director's uncontested evidence that Perry's discharge has already had a profound chilling effect on employees' willingness to even speak to the Union.

Because it ignored the serious, harmful effect that Perry's discharge had on employees, the court erroneously balanced the harms against injunctive relief. There is, however, no meaningful harm to the Company from reinstating Perry that outweighs the harm to employee rights and the Board's remedial authority. Perry's interim reinstatement would provide the Company with the labor of an experienced employee who, until her discharge, had a good disciplinary record, and it would not prevent the Company from enforcing work rules and discipline in a non-discriminatory manner.

Contrary to the district court's finding, neither the Board's delay in seeking an injunction nor Perry's supposed ineligibility for reinstatement weigh against interim reinstatement. First, the Board acted promptly in seeking this injunction, filing it approximately three months after issuing the unfair labor practice

complaint and a mere six weeks after the close of the administrative hearing.

Second, the facts upon which the court's decision relies in finding Perry ineligible for reinstatement are contrary to the record evidence and Board law.

VI. ARGUMENT

A. The Applicable § 10(j) Standards

Section 10(j) authorizes the United States district courts to grant temporary injunctions pending the Board's resolution of the unfair labor practice charges. This provision reflects Congress' recognition that, absent interim relief, a respondent in a Board proceeding can often accomplish its unlawful objective before the Board can effectuate legal restraints. *See Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1055 (2d Cir. 1980); *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at *Legislative History of the Labor Management Relations Act of 1947*, 414, 433 (Government Printing Office 1985). Thus, § 10(j) was intended to prevent the frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g., Seeler*, 517 F.2d at 37–38.

To resolve a §10(j) petition, a district court in the Second Circuit considers whether there is “reasonable cause to believe” that a respondent has violated the Act, and whether temporary injunctive relief is “just and proper” under the

circumstances. *See, e.g., Kreisberg v. HealthBridge Mgmt.*, 732 F.3d 131, 141–42 (2d Cir. 2013); *Hoffmann v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364–65 (2d Cir. 2001); *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334, 335 (2d Cir. 1999).

1. The “reasonable cause” standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court should not decide the merits of the case. *See Hoffman*, 247 F.3d at 365; *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032–33 (2d Cir. 1980). Rather, the court’s role is limited to determining whether there is “reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals.” *Id.* at 1033 (quoting *McLeod v. Bus. Mach. & Office Appliance Mech. Conference Bd.*, 300 F.2d 237, 242 n.17 (2d Cir. 1962)). District courts hearing § 10(j) injunction petitions are not to resolve contested factual issues. *See Palby Lingerie*, 625 F.2d at 1051–52 n.5; *see also NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570–71 (7th Cir. 1996). Instead, the Director’s version of the facts “should be given the benefit of the doubt” (*Seeler*, 517 F.2d at 37) and, together with the inferences therefrom, “should be sustained if within the range of rationality” (*Mego Corp.*, 633 F.2d at 1031). *See also J.R.L. Food Corp.*, 196 F.3d at 335.

Similarly, on questions of law, the district court “should be hospitable to the views of the [Director], however novel.” *Mego Corp.*, 633 F.2d at 1031 (quoting

Danielson v. Jt. Bd. of Coat, Suit & Allied Garment Workers' Union, I.L.G.W.U., 494 F.2d 1230, 1245 (2d Cir. 1974)). The Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." *Palby Lingerie*, 625 F.2d at 1051. In sum "appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed." *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995).

The ALJ's findings and legal conclusions in the underlying administrative case supply "a useful benchmark" against which to weigh the strength of the Director's theories of violation. *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). The "preponderance of the evidence" standard applied by the ALJ is a higher burden of proof than the "reasonable cause" test. Therefore, it is appropriate for courts to rely on the ALJ's findings and conclusions in determining whether a district court erroneously rejected the Director's evidence and theories in support of a violation. *See Francisco Foods*, 276 F.3d at 288; *see also Seeler*, 517 F.2d at 37 n.7; *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 238 (6th Cir. 2003). Indeed, the "ALJ's factual findings are part of the record and cannot be ignored." *J.R.L. Food Corp.*, 196 F.3d at 335.

2. The “just and proper” standard

Once reasonable cause is established, §10(j) relief is “just and proper” where the unfair labor practices threaten to render the Board’s processes ineffective by precluding a meaningful final remedy (*Mego*, 633 F.2d at 1034 (discussing *Seeler*, 517 F.2d at 37–38)); where interim relief is the only effective means to preserve or restore the status quo as it existed before the violations (*Seeler*, 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (*Palby*, 625 F.2d at 1055). *Accord Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 255 (S.D.N.Y.), *aff’d*, 67 F.3d 1054 (2d Cir. 1995). In determining whether temporary injunctive relief is “just and proper,” courts apply traditional equitable principles, “mindful to apply them in the context of federal labor laws.” *Kreisberg*, 732 F.3d at 141 (quoting *Hoffman*, 247 F.3d at 368).

B. The District Court Abused its Discretion in Concluding that There Was No Reasonable Cause to Believe that the Company Violated §§ 8(a)(1) and (3) by Terminating Perry

The district court abused its discretion by concluding that the Director had not demonstrated that there was reasonable cause to believe that the Company violated §§ 8(a)(1) and (3) by terminating Perry in retaliation for her protected concerted and union activity. The Director presented ample evidence that the

Company had unlawfully discharged Perry in retaliation for her protected May 11 e-mail and Union activities. The Company has failed to present adequate evidence to support its affirmative defense that the discharge was not discriminatorily motivated. By rejecting the Director's evidence and legal theories and resolving credibility disputes in the Company's favor, the district court abused its discretion.

Section 7 grants employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Activity is concerted under § 7 if it is engaged in, with, or on the authority of other employees, and not merely on the acting employee's behalf. *Myers Indus.*, 268 NLRB 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). Concert also exists where an employee seeks "to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Myers Indus.*, 281 NLRB 882, 887 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). This Court has found that individual employees acting alone may be engaged in § 7 protected concerted activity because, in order to "protect concerted activities in full bloom, protection must necessarily be extended to intended, contemplated or even referred to group action, lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions." *NLRB v. Caval*

Tool Div., Chromalloy Gas Turbine Corp., 262 F.3d 184, 188 (2d Cir. 2001) (quoting *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969)).

Section 8(a)(3) prohibits employers from discriminating “in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Accordingly, an employer violates §§ 8(a)(3) and (1)³ by taking adverse action against an employee because of her union or other protected, concerted activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397–98 (1983); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957, 959–60 (2d Cir. 1988). In demonstrating a § 8(a)(3) violation, the Board’s General Counsel must prove that: “1) the employee was engaged in protected activity, 2) the employer was aware of this activity, and 3) the employee’s protected union activity was a substantial or motivating factor behind the employer’s decision to take the adverse employment action.” *NLRB v. Matros Automated Elec. Constr. Corp.*, 366 F.App’x 184, 187 (2d Cir. 2010) (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)). Once it is shown that the employer’s opposition to union or protected concerted activity was a motivating factor in its decision to take adverse action against an employee, the employer will be found to have violated the Act, unless the employer demonstrates, as an

³ An employer that violates § 8(a)(3) also derivatively violates § 8(a)(1). *Office & Prof’l Emps. Int’l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1992).

affirmative defense, that it would have taken the same action even absent the employee's union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 400–04; *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1084 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). *Accord NLRB v. S.E. Nichols*, 862 F.2d at 957.

In demonstrating an unlawful motive, the Board may infer motive from both direct and circumstantial evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Abbey's Transp. Servs. v. NLRB*, 837 F.2 575, 579 (2d Cir. 1988). Courts, including this one, afford particularly deferential review to the Board's motive findings because “[d]rawing . . . inferences from the evidence to assess an employer's . . . motive invokes the expertise of the Board.” *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). *See S.E. Nichols*, 862 F.2d at 956 (“Act vests primary responsibility in the Board to resolve these critical issues of fact,” including motive).

The Board need not accept “at face value the reason advanced by the employer” if the “evidence, and the reasonable inferences drawn therefrom,” indicate that the employer was motivated by union animus. *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962). *See Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (employer's explanation rejected where it is an “excuse rather than the reason for [its] retaliatory action”). An employer fails to

prove its affirmative defense where, as here, the record shows that the employer's justifications for the adverse actions are "pretext[s] to mask discrimination." *S.E. Nichols*, 862 F.2d at 957.

1. The Director demonstrated strong cause to believe the company terminated Perry in retaliation for her protected concerted and Union activities

There is strong cause to believe that the Company violated §§ 8 (a)(3) and (1) by discharging Perry in retaliation for her protected concerted complaints and her activity in support of the Union in its effort to quell the nascent Union campaign at its Jericho call center.

a. Perry engaged in activity protected by the Act

There is no dispute that Perry was engaged in protected Union activity and that that activity was protected under § 7. The evidence also amply demonstrates that, under well-established Board law, Perry's May 11 e-mail to the Company's CEO was protected under § 7. Perry's credited testimony establishes that her conversations with coworkers concerning their shared concerns over performance evaluation metrics were the reason for sending her e-mail to Dolan. By e-mailing Dolan, raising concerns that she and her coworkers shared, Perry was "bringing truly group complaints to the attention" of the Company's CEO, Dolan. *Myers Indus.*, 281 NLRB at 887. Furthermore, Perry's testimony—that she re-raised workers' shared concerns about the NPS metrics at her May 18 meeting with

Panno and about her organizing activities on behalf of the Union in May and June 2015—is unrebutted and was credited by the ALJ.

b. The Company had knowledge of Perry’s activity

Employer knowledge of employees’ protected activities may be adduced either through direct or circumstantial evidence. *Cf. NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972). In the instant case, there is no doubt that the Company knew of Perry’s protected concerted and Union activities, given that those activities included her initial May 11 e-mail to the Company’s CEO mentioning “whispers of unionization,” which was rapidly forwarded to several high level executives. Furthermore, Panno testified that once she began her investigation, she contacted other high-level Company officials and involved them. Additionally, Perry’s immediate supervisor, Mohip, and manager, Vega, were both repeatedly counseled about Perry’s e-mail and were asked to investigate if Perry intended to send other e-mails. Additionally, Mohip’s and Maharaj’s knowledge that Perry was planning to take action to bring “whispers of unionization” to fruition are imputed to the Company under applicable Board law. *See, e.g., Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 n.26 (2005), *enforced*, 456 F.3d 265 (1st Cir. 2006) (supervisory knowledge imputed to employer absent credible, affirmative evidence establishing that supervisor did not share information with others). Additionally, there is ample evidence from which to

infer the Company's knowledge of Perry's protected activities. In response to Panno's HR investigation into Perry, Prochazka discussed Perry's email with Mohip and reported back to Panno as to what Mohip knew about Perry's intention to write the May 11 e-mail and future e-mails. Mohip received similar instructions from his manager Vega. In sum, based on the credible evidence there can be no legitimate claim that the Company lacked knowledge of any of Perry's protected activities. Thus, the evidence amply supports the district court's finding that there is reasonable cause to believe that the Company knew of Perry's protected activities. (SPA18–19.)

c. The Company discharged Perry for her protected activity

In demonstrating an unlawful motive, the Board may rely on either direct or circumstantial evidence. *See NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 115–116 (2d Cir. 2001); *Real Foods Co.*, 350 NLRB 309, 312, n.17 (2007). The record evidence overwhelmingly demonstrates the Company's discriminatory motive in discharging Perry. First, there is the testimony of employee Gyles—credited by the ALJ—that Mohip admitted after Perry's discharge that Perry was discharged because of her union activity. There is also the testimony of Senior Vice President Gillingham that Perry's protected activities were discussed as part of the conversation during which the Company decided to terminate her.

Additionally, there is circumstantial evidence that creates a strong inference of the Company's unlawful motives. The Company's swiftness in launching a thorough HR investigation into Perry's work performance came literally minutes after Dolan's e-mail account received Perry's protected May 11 e-mail. This Court has consistently held that close temporal proximity between protected activity and retaliatory action—such as Perry's protected May 11 e-mail and the Company's retaliatory HR investigation—provides a strong, independent basis on which to infer an employer's union animus. *Gaetano & Assocs. Inc. v. NLRB*, 183 F.App'x 17, 20 (2d Cir. 2006), *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982), *NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 400 (2d Cir. 1980). *See also NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 465 (2d Cir. 1973) (“The abruptness of a discharge and its timing are persuasive evidence as to motivation”). Further under cutting the propriety of the Company's motive for investigating Perry is the fact that the Company failed to produce evidence that it has ever conducted a similar “escalation summary” and investigation into any other employee who availed themselves of the Company's professed “Open Door” policy. (Add. 34.) Indeed, Perry's 2012 e-mail to Dolan—in which she stated that she did not believe unions were necessary—did not lead to any such investigation, as opposed to the 2015 e-mail raising complaints and tying them to “whispers of unionization.”

Although the Company offered the post-hoc rationale that Perry was discharged for receiving poor NPS scores for the preceding few months, the evidence does not support that assertion. The Company did not provide Perry with any warnings that her low NPS scores could result in termination. In fact, both Panno at her May 18 meeting with Perry and Tucci at Perry's June 8 discharge meeting specifically told Perry that there were no concerns with her performance. (JA70, JA94.)

In addition, the evidence demonstrates that Perry was treated in a disparate manner to other employees who were discharged for poor performance in the preceding eighteen month period. In almost every case, employees discharged for poor performance had either received written warnings or performance plans aimed at their poor performance or were subject to prior discipline, unlike Perry, who had a clean disciplinary record. (JA58, JA114, JA759–60.) Indeed, in the prior eighteen months, the Company had not terminated a single employee for performance issues without first providing them with a warning or a performance plan. (JA178, JA578, JA601–12, JA614–28, JA630–33, JA635–41, JA643–46, JA648–57, JA659–69, JA671–73.) Furthermore, the evidence establishes that though Perry's recent metrics were below average, there were numerous other employees with *lower* metrics who were neither disciplined nor discharged. (JA508–13, App. 36–37.) In fact, Perry's NPS scores for the months of March and

April—17.9% and 20.9 % (respectively) (JA970–72)—while low, were still higher than 30 employees’ scores in March and higher than 304 employees’ scores in April. (JA508–13.) The only thing setting Perry apart from these coworkers is that she had e-mailed Dolan to inform him of the “whispers of unionization.” Indeed, as noted above, manager Gillingham admitted that she and Panno discussed Perry’s May 11 e-mail in deciding that the best course of action was termination. (JA306.) In sum, the evidence before the district court demonstrates a strong cause to believe that Perry was discharged for her protected activity, and that the Company failed to rebut the evidence of unlawful motive. The district court abused its discretion in concluding otherwise. The ALJ’s eventual conclusions to that effect further strengthen the Director’s prospects of successfully establishing this violation before the Board and a Court of Appeals.

2. The district court abused its discretion by concluding that the Director had not demonstrated reasonable cause to believe Perry’s discharge was unlawful

The district court abused its discretion in several important respects in finding that there was not reasonable cause to believe that the Company violated the Act by discharging Perry. Importantly, the district court did not give the Director’s evidence and legal theory sufficient deference under this Court’s precedent in resolving the § 10(j) petition.

Initially, the court erred in concluding that the evidence did not establish Company animus against Perry's concerted and union activities. The court concluded that neither the 2014 ALJ decision nor Panno's statement concerning unions on May 18 demonstrated animus. But the court abused its discretion by ignoring other evidence of animus. Initially, the court misapplied Board law when it disregarded as non-probative how swiftly the Company began investigating Perry's work history, and the breadth of that investigation, after she sent her e-mail to Dolan. (SPA21.) The court mistakenly concluded that these facts were not relevant because Perry's e-mail preceded her union activity. But the e-mail itself was protected, concerted activity; investigating and terminating her because of the concerted complaint in the e-mail would violate the Act even if Perry had never contacted the Union. In addition, the e-mail itself implied that the Company's policies could prompt the employees to begin organizing, so that the Company would reasonably construe it as a prelude to Perry's organizing activities. The Company's immediate, panicked response to the e-mail demonstrates that it caused the Company to identify her as an activist or agitator, motivating the Company to target her for an immediate far-ranging investigation and termination. That Perry had not yet contacted the Union is irrelevant; what matters is that her e-mail led the Company to believe that she had or intended to.

In addition, the court ignored that the Company provided no examples of the Company ever launching an escalation summary in response to any other employee who had e-mailed CEO Dolan. Indeed, the court erred by ignoring the undisputed fact that the Company began its investigation *because of* Perry's protected May 11 e-mail to Dolan. Under Board law, any fruits of that investigation—including Perry's NPS scores—would not transform an otherwise unlawful discharge into a lawful one. *Kidde, Inc.*, 294 NLRB 840, 840 n.3 (1998) (employee's misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful). Similarly, the court wholly ignored Gyles's testimony that Mohip—Perry's direct supervisor—admitted that Perry's discharge was because of her Union activities and that Union supporters were problematic. *Mediplex of Stamford*, 334 NLRB 903, 903 (2001) (and cases cited therein) (employer expression of views or opinions against union may be used as background evidence of animus even if it is not a violation in and of itself). By failing to even consider all of the Director's evidence of the Company's union animus, the court misapplied Board law and failed to give proper deference under the reasonable cause test to the Director's legal theory establishing animus.

The court further abused its discretion when it credited the Company's post-hoc rationale for discharging Perry. Throughout the court's decision, the court repeatedly and inappropriately deferred to the Company's version of the facts

without giving proper deference to the Director's evidence and legal theories. In particular, the court relied on the Company's vague assertions that it always completed escalation summaries for employees who e-mailed Dolan. Yet, the record is devoid of any evidence of the Company performing a similar investigation or producing an "escalation summary" for *any* employee who communicated workplace concerns to the Company's senior leadership. (SPA21, Add. 35–36). The court also credited the Company's assertion that Perry rebuffed Mohip's counseling regarding her allegedly low NPS scores for several months prior to her termination. In doing so, the court inexplicably rejected the Director's evidence that established that Perry was never ordered to attend—nor received—additional formal trainings on NPS or ever even informed of her "low" NPS scores. Indeed, the Company's account of its coaching sessions is undermined by the fact that Mohip never testified about his alleged coaching sessions with Perry. Instead, the Company proffered notes from coaching sessions purportedly prepared by Mohip, but never authenticated by him. (JA978–1004.) An examination of the May 2015 coaching notes indicates that they were modified several weeks after the coaching session allegedly occurred on May 13, 2015. (JA1003–04.) Indeed, the ALJ found that the notes were questionable "as to their veracity" and, instead, credited Perry's account of her conversations with Mohip—that she was never

advised of deficiencies in her performance nor told to attend trainings. (JA55–56, JA70–71, Add. 35.)

The court similarly accepted the Company’s claim that Perry was “hostile” to NPS coaching and that she “refused” to take advantage of NPS training opportunities. (SPA23.) Although Perry’s responses to Panno may have evidenced some negative attitude, the court wholly ignored that Perry’s criticisms of the NPS metrics were at the very heart of her § 7 protected complaints to both Dolan and Panno. Furthermore, regardless of her attitude towards training or coaching, there is no conclusive evidence that Perry was ever directed (or refused) to attend NPS training. Indeed, Perry’s supervisor Mohip testified that Perry was “very receptive to coaching” and tried to adapt her performance based on Mohip’s suggestions. (JA194.) In fact, on June 9—the day *after* Perry’s termination—the Company listed Perry on its May 2015 “Monthly Recognition” for its VoC initiative—a list of employees who had received perfect scores on the VoC surveys on which the NPS scores are based. (JA587.) Despite this contradicting the Company’s claims, the district court interpreted the evidence in the light most favorable to the Company, rather than giving the Director’s theory of the case “the benefit of the doubt.” (*Seeler*, 517 F.2d at 37),

The Director presented credible evidence to demonstrate that the Company had discharged Perry for her protected activity. In support of the Director’s theory,

the Director presented evidence that the Company knew of Perry's May 11 e-mail, that Perry renewed her concerted workplace concerns with Panno on May 18, that Perry's May 11 e-mail and May 18 concerted complaints were born out of discussions with her co-workers, that she referenced unionization in both the May 11 e-mail and during the May 18 meeting, and that the Company swiftly investigated and terminated Perry—without proffering to her any reason for doing so—after she engaged in those activities. Indeed, in finding Perry's termination unlawful, the ALJ relied on the very evidence presented by the Director to the district court. (App. 30–36.) The district court erred by not giving that version of the facts “the benefit of the doubt.” *Seeler*, 517 F.2d at 34.

The court's error in discrediting the Director's evidence and version of the facts has been made more stark by the recent ALJ decision. The ALJ, who observed the demeanor of the witnesses directly, credited the Director's evidence over the Company's evidence erroneously credited by the district court. *Cf. NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir.1999) (“When the Board's findings are based on the ALJ's assessment of the credibility of witnesses, they will not be overturned unless the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or the undisputed documentary testimony.” (citations and internal quotation marks omitted)). The court, however, did more than just fail to give the Director's version of the facts proper deference. The court

erroneously found that the Company had satisfied its affirmative defense and proven that it had terminated Perry for cause where the Company provided no evidence that it would have investigated Perry absent her protected activity or that it has treated similarly situated employees similarly.

C. The District Court Abused its Discretion by Denying Interim Reinstatement to Perry

The district court abused its discretion by concluding that Perry's absence from the workplace threatened no irreparable harm and that the balance of equities weighed against her interim reinstatement. Perry was the point person for the Union's campaign and served as a conduit between the Union and the Company's employees. Her discharge caused a dramatic chilling impact on other employees. A Board order will be too late to remedy these harms. Her interim reinstatement, on the other hand, would cause no irreparable harm to the Company or its employees. The Company would benefit from the work of an experienced employee who, until recently, it had considered an employee who provided "exceptional customer service." (JA433.) Furthermore, the Company has not satisfied its heavy burden in demonstrating that Perry is unfit for reinstatement.

1. The Company's unfair labor practice threatens irreparable harm to its employees' § 7 rights

This Court, among others, has long recognized that unlawful adverse employment actions, such as terminations, which threaten to "nip" union

organizing drives “in the bud,” warrant injunctive relief, and that reinstatement of the employees is necessary to avoid “serious adverse impact on employee interest in unionization.” *Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1052 (2d Cir. 1980). Otherwise, the remaining employees who “know what happened to the terminated employee[will] fear that it will happen to them.” *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996). This fear of retaliation that inhibits employees from exercising their rights under the Act is “exactly the ‘irreparable harm’ contemplated by § 10(j).” *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001).

The discharge of Perry, known by employees to be a Union supporter, “risked a serious adverse impact on employee interest in unionization.” *Kaynard*, 625 F.2d at 1053. When an employee activist like Perry is discharged, the remaining employees receive the inescapable message that ongoing concerted or union activity will cost them their jobs and neither the Board nor the Union can provide a timely remedy. *See Pye*, 238 F.3d at 75. Absent prompt injunctive relief to counteract that message, those remaining employees, especially ones who were undecided about organizing, will not participate in the campaign or support the Union after seeing what happened to an outspoken supporter. *Pye*, 238 F.3d at 74–75, 76; *Electro-Voice, Inc.*, 83 F.3d at 1573, 1575. In those circumstances, no worker “in his right mind” will “participate in a union campaign” *Silverman*

v. Whittal & Shon, Inc., 125 LRRM 2150, 2151, 1986 WL 15735, *1 (S.D.N.Y. 1986). *See Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 576 (2d Cir. 1988) (employees are “certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs”).

Here, the record evidence establishes that Perry's unlawful discharge was having this predictable adverse effect on employees and amply supports the need for an order requiring her interim reinstatement. Perry and the Union were just starting to rally employee support for the Union at the time of her termination on June 8 and she was indispensable as the Union's “point person.” After she initially contacted the Union, Perry began organizing employees at the Jericho call center. She provided co-workers with contact information for the Union organizers and encouraged employees to attend organizing meetings. She also collected employees' e-mail addresses and updated them about the Union organizing efforts. Indeed, she was “the face of the Union” campaign at the Jericho call center.

Predictably, as Perry was the Union's primary employee organizer, organizing activities came to a halt with her termination. Although approximately seventeen employees had initially expressed interest in unionizing, none were willing to communicate with Union organizers after Perry's termination. An organizing meeting that she was planning on the day that she was discharged never came to fruition once she was gone. Employee Gyles was incensed to hear her

supervisors referring to her as “in cohorts” with Perry and the Union because she was afraid she would be fired if someone else heard.

This chill on employees’ willingness to engage in concerted activity and their support for the Union will solidify in the absence of a timely remedy and will be irreparable by the time a final Board order issues. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1364 (9th Cir. 2011). With employee concerted activity stifled and Union support strangled, the Board’s eventual final order will be an “empty formality.” *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). *See Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 878–79, 81 (3d Cir. 1990) (chilling effect of retaliation against union activists cannot be undone by eventual Board order). When the Board finally acts, “the employees then at the plant may not wish to exercise the rights thus secured to them . . . [interim] [r]einstatement of the illegally discharged employees is the best visible means of rectifying this.” *Angle*, 382 F.2d at 660–61. Because fear of retaliation may cause employee willingness to support the Union to completely extinguish by the time a Board order issues, Perry’s interim reinstatement is necessary to erase the chill before it is too late. *See Palby Lingerie*, 625 F.2d at 1053; *see also Pye*, 238 F.3d at 75.

Interim reinstatement of Perry now is also the best means to protect the effectiveness of the Board’s eventual remedy and avoid remedial failure. Interim reinstatement decreases the likelihood that a discriminatee will scatter to a new job

or new location and increases the likelihood that the discriminatee will continue to support the Union and be available for reinstatement. As the court noted in its decision, Perry continues to support the Union now. (SPA27, JA1165, JA1167–68, JA1170, JA1172.) While her coworkers have been chilled by her discharge, Perry remains ready to return to the Jericho call center and restore her coworkers' confidence in organizing. The Union has continued its organizing efforts throughout Cablevision facilities, tries to remain engaged with employees, and continues to be interested in rekindling the campaign at Jericho. (JA38–39.) As time passes, Perry is less likely to be available for reinstatement and her absence from the workplace will inevitably make it harder for the Company's employees to coalesce again and join in support for the Union. Thus, an order requiring Perry's interim reinstatement would effectively protect employee rights and the Board's remedial ability.

An order enjoining further violations is also necessary to assure employees that they can exercise their § 7 rights without further coercion. *See, e.g., Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133, 1135 (10th Cir. 2000) (order to cease and desist from alleged violations was proper additional relief to preserve Board's ultimate remedial authority); *see also Schaub v. W. Mich. Plumbing & Heating Inc.*, 250 F.3d 962, 970–71 (6th Cir. 2001) (order to cease and desist from further discrimination not an abuse of discretion); *NLRB v. Electro-Voice, Inc.*, 83 F.3d

1559, 1575 (7th Cir. 1996) (enjoining employer from committing further unfair labor practices).

2. The district court abused its discretion in determining that injunctive relief was not just and proper

Given the risk of irreparable harm to employees' willingness to engage in protected activity because of their legitimate fear of retaliation, the district court abused its discretion when it determined that the relief sought was not appropriate. The court ignored this considerable harm that Perry's discharge has had on employees' exercise of their rights under the Act and incorrectly balanced the harms against injunctive relief.

a. The court ignored the established harm to employees' right to engage in Union activities caused by Perry's discharge

In concluding that Perry's interim reinstatement was unnecessary to prevent remedial failure in this case, the district court fatally abused its discretion by failing to even consider the established and uncontradicted chilling effect Perry's discharge had on other employees. Because the district court did not even consider this factor, its conclusion that an injunction would not be just and proper is based on a faulty premise from the start.

This Court recognizes that the discharge of open union adherents will negatively affect employees who are "certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs." *Abbey's Transp.*

Serv., 837 F.2d at 576. As discussed above, this is a well-recognized harm that flows from discrimination against union supporters. The evidence here, as discussed above, established that harm. Perry's discharge has resulted in a tremendous adverse impact on employees' willingness to participate in the Union's organizing drive. Since Perry's termination—which came at the campaign's infancy—"everything [h]as shut down."

The court belittled the fact that the Union's campaign was in its infancy (SPA26–27) and, by doing so, erroneously diminished the startling impact of the Company's unlawful conduct and the obvious need for injunctive relief. If, as the court points out, "[t]here was barely any interest in the union at the time of Perry's termination," (SPA26), then that is because the Company acted so swiftly in getting rid of the primary activist. And while, as the court notes, "she did not attend any union organizational meeting prior to her termination," (*Id.*), the evidence is uncontradicted that Perry had organized the first meeting of her fellow employees to occur the very same day that she was discharged. By trivializing the fact that the discharge of Perry stopped a nascent campaign dead in its tracks, the court rewards the Company for the effectiveness of its unlawful actions.

Contrary to the district court's conclusion, it is irrelevant that Perry is willing to continue engaging with her co-workers if her former co-workers are too scared to engage with her. The court also ignores that Perry's organizing activities

“from the outside” serve as a constant reminder to employees that they, too, could be unemployed should they dare to open support the Union. Indeed, “no other worker in his right mind would participate in a union campaign” where the first employee organizer was terminated before the campaign even had a chance to grow. *Silverman v. Whittall & Shon*, 1986 WL 15735, at *1. See *Schaub* 250 F.3d at, 971 (“the absence of the only union organizer at the company for an extended period of time could irreparably harm the union’s chances of organizing employees” (internal quotations and modifications omitted)). Yet, the district court failed to even acknowledge this obvious and established harm in its balancing of the equities. (SPA26.)

The court also wrongly dismissed the danger that, absent interim reinstatement, Perry might not be available for reinstatement. The court appeared to misunderstand the import of this risk, assuming that it relates solely to Perry’s benefit in being able to accept reinstatement, and thus in “vindication of purely private rights.” (SPA27.) The risk of Perry becoming unavailable over time, however, is that she will be unable to return to resume her organizing activities, that other employees will not step up to assume her role, and that the chilling message sent by her discharge and ongoing absence will therefore never be fully dispelled as it would be if employees saw her return to the facility. Thus, prompt

reinstatement to ensure the likelihood that Perry is able to return to the workplace is indeed in the public interest, not solely for her private benefit.

b. The court erroneously relies on the Director’s “delay” in filing the petition

The court faults the Director for waiting six months after the unfair labor practice occurred to file the petition (SPA25), but the chronology reveals that the Director acted expeditiously. On June 18, 2015, the Union filed its first charge, at which point the Director began the investigation. (JA378.) On August 24, 2015, slightly more than two months later, the Director concluded his investigation and issued complaint (JA364–69.) The administrative hearing before ALJ Landow began on September 28, 2015 and concluded October 30, 2015. On December 10, 2015, the Director petitioned for an injunction.

The above timeline shows that the Director acted as expeditiously as possible for an agency that must investigate and deliberate and cannot “operate overnight.” *Maram v. Universidad Interamericana De Puerto Rico*, 722 F.2d 953, 960 (1st Cir. 1983) (the Board cannot operate overnight, and it should have time to investigate and deliberate). The court’s focus on the delay between the unfair labor practices and the filing of the petition for injunctive relief demonstrates a misunderstanding of the § 10(j) process and the Board’s need to investigate and deliberate before it seeks a § 10(j) injunction. This Court has recognizes that the

Board “‘does not take lightly the commencement of a § 10(j) action,’ and it is acceptable for months to pass between the alleged unfair labor practices and the Regional Director’s decision to commence a § 10(j) action.” *Paulsen v. Renaissance Equity Holdings*, 849 F. Supp. 2d 335, 361 (E.D.N.Y. 2012) (14-month delay permissible (quoting *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984))). As one court has noted, “[t]he Board needs time to do a thorough investigation before it even requests the injunction. To require the Board to sacrifice thorough evaluation for speed would dissipate the Board’s expertise, and dilute the statutory deference principle.” *Pascarella v. Vibra Screw, Inc.*, 904 F.2d 874, 881 (3d Cir. 1990).” Given the logistical complexity of the case (an eight-day hearing involving 11 witnesses) and the need to conduct a thorough investigation, six weeks between the conclusion of the administrative hearing and the filing of the injunction is not “undue delay.” *See, e.g., Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 248–49 (3d Cir. 1998) (14-month passage of time insufficient to deny relief when injunction otherwise warranted).

The district court improperly criticized the Board’s decision to wait to petition the court until after development of the administrative record. (SPA25–26.) Such an approach is well-established and has been lauded by many courts. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011) (by awaiting the judge’s decision, “the Director made the [court’s] task in evaluating the propriety

of interim relief much easier, and much more likely to be carried out accurately”); *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 544–45 (4th Cir. 2009) (18-month delay is not a basis to refuse interim relief where Board was waiting for ALJ decision). The court’s criticism of the Director’s approach ignores the undeniable benefits that this course of action produced –the development of a complete administrative record, a well-reasoned decision, and the avoidance of a duplicative, time-consuming proceeding. *Cf. Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 856 (5th Cir. 2010) (“[B]ecause the ALJ’s fact-finding here aided the district court’s adjudication of [§ 10(j)] petition, delay alone is not dispositive.”)

More importantly, the passage of time is only relevant if it precludes restoration of the lawful status quo ante or renders restoration of the status quo unnecessary. *See Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988); *Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987). This Court “reject[s] the notion that the passage of time, is sufficient to justify rejecting” injunctive relief if there is “evidence of ongoing interest in organizing hindered by absence of discharged employees” who would return if the injunction was granted. *Paulsen v. Remington Lodging & Hospitality*, 773 F.3d 462, 471 (2d Cir. 2014).

Applying the above standard, the Court remains able to return the parties back to the pre-unfair labor practice status; restoration of the status quo is still feasible and more likely than under a final Board order. Perry remains available

for reinstatement and willing to resume her organizing activities; the Union remains involved in its multi-facility organizing campaign at Cablevision. A reinstatement order, even at this juncture, would do much to reinvigorate the Union's campaign at the Jericho call center. *See Aguayo*, 853 F.2d at 745–46, 750 (remand to order interim reinstatement roughly one year after the terminations occurred, noting that reinstatement “would revive the union’s organizational campaign” and rejecting argument that the “harm has already occurred”); *see also Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135–36 (10th Cir. 2000) (interim reinstatement necessary, even though injunction petition was filed seven months after the original charge, because reinstatement “might revitalize the Union’s sagging organizational campaign”). Thus, contrary to the court’s conclusion, the passage of time, not unreasonable here, does not preclude an effective injunction in this case.

Finally, using the Board’s delay as the basis to deny interim reinstatement “punishes the wronged employees for the Board’s belated action, an unacceptable outcome.” *Hirsch*, 147 F.3d at 249. Cf. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264–65 (1969) (“the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers”).

c. The public interest and the balance of equities favor granting an interim reinstatement order

In comparison to the serious threatened irreparable harm to the Board's remedial authority, the public interest, and the employees' § 7 rights in the absence of injunctive relief, there would be no meaningful harm to the Company from offering Perry interim reinstatement. Interim reinstatement of an experienced employee whose last lawful discipline was over four years ago poses no harm to the Company. The requested injunction will not prevent the Company from applying work rules and discipline in a non-discriminatory manner. *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d 902, 906 (3d Cir. 1981). Here, the interim relief of reinstatement will ensure that the Company does not succeed in its attempt to thwart the employees' protected rights. Given the strong likelihood of success on the merits, as well as the strong showing of irreparable harm, the requested relief best serves the public interest in preserving the Board's remedial power.

The district court abused its discretion in determining the balance of equities tipped in the Company's favor. (SPA26.) The court, instead of concentrating on the harm that Perry's discharge and absence would create for the Company's employees, erroneously looked at the harm that Perry would suffer absent interim reinstatement. The court's error is compounded by a patent misreading of Union

Organizer Stern’s affidavit concluding that, because Stern only discussed one employee (“Employee A”) in detail, only one employee had expressed interest in the Union before Perry’s discharge. (SPA26–27.) To the contrary, Stern’s affidavit chronicles how he was beginning to reach employees who seemed interested prior to Perry’s termination, but how no one would call him back after. (JA38–39.) Thus, by utilizing a patently incorrect reading of Stern’s affidavit testimony, the court’s balancing of the equities was fatally flawed.

d. The court’s conclusion that Perry is not entitled to reinstatement is contrary to well-established principles of federal labor law

Finally, the district court abused its discretion in determining that Perry was not entitled to reinstatement because of “her failure to truthfully answer employment history questions on her application.” (SPA26.) It is uncontested that Perry, when she first applied for employment with the Company on a part-time basis—in July 2004—stated that she had left her employment with Collegis, Inc. due to “reorganization.” She also failed to disclose her full-time employment with another employer at the time she applied for a permanent position with the Company. Perry testified, however, that at some point during her interview with the Company she disclosed the actual reason for her prior discharge—wrongful termination—and the fact that she could not accept full-time employment with the Company when she first applied because she already had full-time employment.

(JA318.) The Company adduced no testimony to contradict Perry’s account of her interview for employment with the Company. Indeed, the only testimony that the Company attempted to proffer—non-specific testimony from a former HR employee who was not at Perry’s interview, was discredited by the ALJ as “uncorroborated hearsay.” (Add. 41.) Further undermining its own witness’s testimony, the Company provided evidence that it conducted an in-depth pre-employment investigation of Perry that included contacting her former employer. (JA314, JA1102–04.) Furthermore, although the Company provided several examples of other employees it had terminated for falsifying their employment applications, every example that the Company produced involved concealed criminal conduct. (*Id.*)

The district court ignored Perry’s testimony and the dissimilar nature of the Company’s proffered examples of termination for falsification. Instead, the court improperly credited the Company’s version. However, under the National Labor Relations Act, the Board will limit reinstatement rights only if the employer “demonstrates that the misconduct . . . is not conduct of a sort that it has tolerated in the past.” *Axelson, Inc.*, 285 NLRB 862, 857 n.8 (1987). Here, the Company has not remotely met this burden. The Company has not presented evidence to discredit Perry’s account that she disclosed the alleged falsifications during her interview with the Company—an account credited by the ALJ. Furthermore, the

only conduct that the Company has demonstrated that it has previously not tolerated has been failing to disclose criminal convictions—conduct wholly dissimilar from Perry’s “falsification.” Indeed, the Company’s arguments were raised before the ALJ and, based on the credible evidence, were flatly rejected. (Add. 40–42.) In sum, the district court erred by finding Perry’s reinstatement inappropriate.⁴

⁴ The district court—without explanation—also found Perry’s “violation of the [ALJ’s] sequestration order by sending a mass email to her former co-workers” to constitute further support for denying interim reinstatement. (SPA27 n.12.) The Board’s standard in these situations, announced in *Lear Siegler Management Service Corp.*, 306 NLRB 393, 393–94 (1990), denies reinstatement to discriminatees who threaten witnesses in order to influence testimony. The ALJ, in finding Perry still eligible for reinstatement, found Perry’s “apparent violation” to be “technical and nonprejudicial.” (Add. 38.)

VII. CONCLUSION

The Board asks this Court to overturn an order that wrongly preserves the post-unfair labor practice status quo—a status quo that this Court has repeatedly found undeserving of protection—and to restore conditions as they existed before the Company unlawfully discharged Perry in order to squelch the Union’s campaign. *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975). For the foregoing reasons, the Board respectfully submits that this Court reverse the district court’s order denying an interim injunction and direct the issuance of the requested relief.

Respectfully submitted,

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Washington, D.C.
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,035 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2007 in proportionally spaced, 14-point Times New Roman.

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Dated at Washington, D.C.
this 10th day of June 2016

Addendum

JD(NY)-15-16
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CSC HOLDINGS, LLC, and
CABLEVISION SYSTEMS CORPORATION

and

Case No. 29-CA-154544

COMMUNICATION WORKERS
OF AMERICA, AFL-CIO

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DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. Based upon charges filed by the Communication Workers of America, AFL-CIO (Charging Party or Union), the Regional Director Region 29 issued a complaint and notice of hearing (complaint) on August 24, 2015,¹ alleging that CSC Holdings LLC and Cablevisions Systems Corp., a single employer (Respondent, Company, or Cablevision)² violated Section 8(a)(1) and (3) of the Act by discharging its employee Dorothea Perry due to her concerted, protected and union activities. Respondent filed an answer denying the material allegations therein. Additionally, Respondent has raised certain affirmative defenses which will be discussed, as relevant, below.

This matter was held before me on September 28, 29, and 30, October 1, 7, 8, 28, and 30 in Brooklyn, New York.

Based upon the entire record ³ and after carefully considering the testimony of the

¹ All dates are in 2015, unless otherwise specified.

² For the purposes of this proceeding, Respondent admitted that the two named entities are a single employer.

³ Respondent's Motion to supplement the record and correct the transcript filed on December 14, is hereby granted.

JD(NY)-15-16

witnesses,⁴ the briefs filed by the General Counsel, Respondent, and the Charging Party I make the following

FINDINGS OF FACT

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Jurisdiction

The record establishes that Respondent is a provider of cable television, internet, and telephone communication services in the United States. Annually, in the course and conduct of its business operations, Respondent derives gross revenues in excess of \$500,000 and purchases and receives at its facilities located within the State of New York goods and services directly from suppliers located outside the State of New York. Respondent admits, and I find that at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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Alleged Unfair Labor Practices

Respondent's Operations

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Respondent operates "call centers" at various locations throughout lower New York State, including a facility in Jericho, New York, the primary location involved herein. The Jericho facility has approximately 450 employees who are responsible for responding to customer inquiries regarding products, services or billing. Such employees are known as Technical Support Representatives (TSRs). Dorothea Perry was one such employee. TSRs report to a TSG (Technical Support Group) supervisor. Each supervisor oversees a group of approximately 15-20 TSRs.

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At the time of her discharge, Perry had been employed for more than 11 years, having started with Respondent in January 2004 as a temporary employee prior to attaining a permanent position in July of that year. She worked on a part-time basis, during the evening shift, 4 days per week.

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Perry, like other TSRs was assigned to a desk and a computer, although not always in the same exact location. Calls are routed to the TSRs via a queue depending upon the nature of the inquiry and transferred to the next available TSR. Perry handled customer calls from all queues.

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There are a variety of desktop applications which are utilized by TSRs to assist customers. The record establishes that Respondent frequently communicated information to its employees via email, which could be accessed in a separate window, even while other

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⁴ My credibility resolutions herein are based upon context, demeanor, weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole. *Double D. Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRN 622, 623 (2001). It must be said that virtually every witness who testified herein raised questions about their credibility at certain times. In this regard, it should be noted that on numerous occasions I have credited certain portions of a witness' testimony where other portions have been discredited. *State Plaza, Inc.*, 347 NLRB 755, 755 fn. 2 (2006). Moreover, while every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based upon the factors described above. Accordingly, any testimony which is inconsistent with or contrary to my findings should be deemed discredited.

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applications were being employed. Other ways in which employees could remain apprised of developments included informal communications with supervisory personnel as well as more formalized one-on-one review meetings. Respondent also conducted so-called "focus groups," which appear to be voluntary meetings, at which various topics would be discussed with Company management or human resources personnel.

Respondent has a human resources (HR) department. At all relevant times, Yvette Panno was Respondent's regional HR director for the Long Island, New York region, which included the Jericho call center. She oversaw a team of six HR managers and one associate. Panno reported to senior vice president of HR Paul Hilber, and Hilber in turn reported to executive vice president of HR Sandy Kapell.

At all relevant times the operations of the Jericho facility were overseen by interim Director John Tucci. The company's principal owner and chief executive owner (CEO) is James Dolan.

Metrics Used to Assess Employee Performance

The record reflects that Respondent tracked and maintained various statistics regarding calls received and handled by TSR's and derived performance metrics accordingly. These included "Total Average Handling Time" (TAHT), which measured the average time the TSR stayed on the line with a caller; "First Contact Resolution," which measured the ability of the TSR to resolve the customer's issue without requiring a subsequent phone call; "Knowledge Checks" which measured the TSRs familiarity with Respondent's products and services and "Adherence" which measured how well a TSR maintained his or her schedule in terms of availability to receive customer phone calls. Respondent also appraised TSR performance through listening to their customer interactions. This metric was called "Quality of Service Delivery" (QoSD).

Beginning in 2015, Respondent introduced a new performance metric called "Net Promoter Score" (NPS) based upon an initiative entitled "Voice of the Customer" (VoC). In brief, after a call was completed, Respondent would send its customers a survey consisting of a series of questions regarding the service received and their experience in calling for assistance. The initial question asked, "Based upon your recent phone call, how likely are you to recommend Optimum to your friends and family." Customers could respond on a scale from 0 to 10. Based upon customer response to this question, the TSR would receive an NPS score. A response of 9 or 10 would result in a positive credit for the TSR, who would be considered to be a "promoter," TSRs receiving scores of 0 to 6 are considered to be "detractors," and such a score would factor negatively against the employee's NPS metric, while a response of 7 or 8 was considered neutral and did not factor into the NPS score. In order to calculate the employee's NPS score, the Employer would essentially subtract the number of detractor scores from the number of promoter scores. Employees were then ranked against other similarly situated coworkers. After its initiation, NPS would count as 30 percent of an employee's performance metric score--and was given the greatest weight of any of the key metrics noted above.

TSRs received feedback regarding their job performance during monthly one-on-one meetings with their direct supervisor during which performance statistics were reviewed and employees were advised of which aspects of their performance were strong, and which were not.

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TSRs also received written annual performance appraisals, which consisted of scores derived from a compilation of various metrics accumulated over the course of a year as well as narratives prepared by their TSG supervisor. Performance was evaluated on a scale ranging from “did not achieve expected performance” to “far exceeded expected performance.” In 2014 the appraisals issued to employees varied and the overall ratings were “strong performance,” “valuable contribution,” and “requires improvement.”

Respondent’s Disciplinary Policies

Respondent maintains an employee handbook which sets forth a schedule of progressive discipline from coaching or counseling to verbal warnings, to formal written warnings. Generally speaking, these actions will precede the termination of an individual’s employment, with certain exceptions, as discussed below.

Additionally, where a TSR demonstrates substandard performance metrics, Respondent may issue a performance improvement plan, also referred to as an “action plan” which focuses on the specific areas requiring improvement within a specific timeframe. This may include a series of follow-up coaching sessions with supervisory personnel. If there is no improvement, termination is a possibility.

Respondent also reserved the option of discharging an employee without prior corrective action in circumstances where there are, “serious infractions of Company policies or if the Company believes that additional corrective action is unlikely to resolve the problem.”⁵

Respondent’s “Open Door” Policy

Respondent’s employee handbook sets forth an open door policy intended to provide employees with “ready access to management” and the “right to raise concerns, suggestions or questions and receive a quick and adequate answer.” This policy grants employees the right to contact members of senior management up to and including the company CEO and states that retaliation toward employees who avail themselves of this option will not be tolerated. There is no specific evidence in the record as to how often employees have utilized this method of sharing their concerns with management, although HR Director Panno testified generally that employees have “from time to time” made use of the policy to “reach out” to CEO Dolan.

As Panno testified, once an employee raises an issue with CEO Dolan, these are treated with the highest priority, and Respondent follows a standard protocol. The communication is logged in to the corporate human resources department and the regional HR director is assigned to immediately investigate and respond as appropriate. No specific examples of such investigations or responses were adduced in the record, other than the Company’s responses to Dorothea Perry.

⁵ In compliance with a subpoena issued by counsel for the General Counsel as modified, Respondent prepared a spreadsheet documenting terminations for the 18-month period preceding Perry’s. In this period of time, 30 call center employees were discharged. Eight employees were discharged for matters relating to their attendance, with no prior discipline. The spreadsheet and other records show that employees discharged for reasons of “unsatisfactory performance” during this period of time had received at least one disciplinary warning or performance improvement plan prior to their discharge.

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Perry's Employment History

Between 2007 and 2011, Respondent issued Perry several disciplinary warnings and performance improvement plans. In October 2008, Perry received a written warning regarding her attendance and failure to arrive to work on time. This written warning noted three prior disciplinary actions in 2007, two for attendance and one counseling discussion for "QoSD" (presumably the metric referred to above as Quality of Service Delivery). In 2009, Respondent issued a performance improvement plan to improve Perry's TAHT and Quality of Service Delivery metrics and, subsequently, an extension of that performance improvement plan. Perry subsequently received a 2009 documented verbal warning regarding attendance. She then was issued a final written warning in 2010 a regarding violation of company rules relating to Perry's use of a personal electronic device while on duty, a 2010 documented verbal warning concerning improper documentation of a service problem in the field and another documented verbal warning issued in March 2011 regarding the TAHT metric. The 2010 final written warning required that Perry not be involved in any further disciplinary issues for a period of 6 months following the warning. Perry did not receive any further discipline during that period of time.

From March 2011 up until her discharge in June 2015, Perry did not receive any further discipline in the form of corrective action, disciplinary warning, or performance improvement plan. In a performance evaluation issued in June 2013, Perry's supervisor noted that she "exceeded expected performance" in the area of job knowledge, noting that: "Dorothea displays a good knowledge of Optimum Online, Optimum Voice and Business Class products. She exceeded the goal for the Knowledge Check exam scores this past year." In the same evaluation, Perry was found to have "achieved expected performance" in the area of "communicates effectively." It was noted that Perry was "patient and understands the needs of the customer. She is effective with turning customers around during difficult situations." She was found to work "diligently" to meet her daily and monthly goals and promote customer satisfaction. It was noted that Perry is receptive to feedback and understands the need to be more consistent with her QoSD monitors. She was also found to adhere to all Cablevision policies and procedures. Her overall score placed her in the category of "exceeded expected performance."

Perry had a similarly favorable year-end review for the period from January 1 to December 31, 2014. Mohip's narratives include numerous favorable descriptions of her performance: "Listens well and understands the needs of the customers;" understands the customer is the main focus;" "is honest and direct in dealing with people;" and "acts consistently with Cablevision values, stated policies and practices." In summarizing the year, Mohip wrote:

Dorothea has had a good year and has been a valuable contributor. She demonstrates a firm grasp of her job and strives for ways to improve her performance and be more productive. She possesses the capability to convey her message in a positive and reassuring manner. She assists our customers with explaining each step taken by using her technical ability. She diligently works toward correcting and improving in those areas where she needs help.

Perry's 2012 E-Mail to Dolan

In February 2012, the Board certified the Union as the bargaining representative of Respondent's employees operating out of Brooklyn, New York. Respondent thereafter held a series of meeting with employees at the Jericho facility. During one of these meetings, Respondent showed employees a video address by CEO Dolan. In his address to employees, Dolan provided them with his email address and told employees to contact him directly with

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problems or concerns. As Perry testified, Dolan also told employees that the Company would no longer use the TAHT call handling time metric as a basis for evaluating TSR performance because he wanted employees to take their time to fully address customer issues.

5 Shortly after viewing Dolan's video address to employees, on February 28, 2012, Perry sent an email to CEO Dolan containing a litany of complaints about what she viewed as unfair management practices. The email began as follows:

10 I write to you today in response to your recent video address to the employees of Cablevision. I appreciate that you are looking to take Cablevision back to a time when employees were valued for their service and loyalty. While I agree that unions should not be necessary, it has come to a point at Cablevision –especially at TSG where I work – that the consideration of unionization might be warranted. I can only speak for the department that I have worked at for over eight years.

15 Some of Perry's complaints concerned arbitrary and unfair treatment by supervisory and managerial personnel. She lodged specific complaints against one of her supervisors, and praised others. Perry asserted that employees who voiced complaints were targeted for retaliation and made specific reference to a complaint she had filed with the New York State
20 Division of Human Rights.

 After Perry sent this email, Frank Livoti, the senior vice president of human resources, sent Perry an email informing her that someone from the corporate HR department would be contacting her. An email exchange with HR Representative Tara Kniss ensued, but it does not
25 appear that the two of them met. Perry did forward to Kniss a series of emails she had exchanged with a member of the HR department back in 2010 in which she complained about what she perceived as the unfair application of performance metrics and how it interfered with her career progression and a write up she had received, among other things. In this series of emails, Perry complained that she was being retaliated against for using the open door policy to
30 voice her opinions and made comments such as: "I feel a stealthy presence of harassment in the air and it is mentally unsettling" and that she was being subjected to "psychological terrorism."

 Subsequent to Perry's 2012 email to Dolan she received no performance or conduct
35 warnings for 3 years and her ratings in her annual performance reviews were seemingly unaffected. In years prior to her discharge, Perry continued to voice complaints, primarily through email to various members of Respondent's HR and supervisory staff regarding what she viewed as unfair treatment.

40 *The Voice of the Customer Initiative*

 As various witnesses for Respondent testified, voice of the customer (VoC) was a key metric across all of the Cablevision contact centers. It was intended to measure customer experience to build consumer loyalty and good will. This is a tool that is not unique to
45 Cablevision, but rather is used by many different companies and industries to measure customer satisfaction.

 The method by which the NPS score was calculated using VoC has been described above. Although the program was initiated in January 2015, Respondent did not count
50 employee scores for that month in order to give employees time to learn the new process. It did, however, begin coaching employees regarding low NPS scores beginning in about March of that year.

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Respondent's witnesses testified that the Company devoted much in the way of resources to its implementation; training supervisors in late 2014. In addition, its roll-out was publicized through the use of communications to employees: putting up posters, holding
 5 meetings and providing coaching and posting information on the Company intranet.

The record establishes that Perry had NPS scores which were below those of certain of her peers. Thus, in 2015 she received coaching or counseling from her direct supervisor Mohip,⁶ especially in regard to this metric. Mohip told Perry that her NPS numbers were low
 10 relative to other TSRs and discussed with her ways to improve her scores. As he testified, beginning in about February 2015, he advised her to go to training in the system. On one occasion Perry responded that she had gone to the meeting, collected some fruit and left. When asked, "Did you ever tell her that her performance on NPS could lead to her termination?" Mohip replied, "I believe I have." He subsequently testified that he could not recall anything about a
 15 specific conversation with Perry in particular, but stated that, "if somebody is not performing up to par-I would let them know-well, I let all the reps know that NPS is going to be a metric and it's one of the metrics that can lead to corrective action and then termination eventually." Mohip also testified that Perry had always been responsive to coaching; however, she let Mohip know that she did not agree with NPS and did not feel that NPS was fair to the employee.

20 The record demonstrates that Perry's NPS scores, while low, did improve in the months immediately prior to her discharge. Her statistics went from 17.9 percent in March 2015 to 20.9 percent in April. By the time Respondent had commenced its investigation into her work history, as will be discussed below, her metrics showed a score of 25. A series of emails among
 25 Company representatives introduced into evidence by the General Counsel appears to show that, at the time of her discharge, Perry was being considered for a monthly recognition award for her scores in May 2015. This was unaddressed by Respondent either in testimony or its posthearing brief.

30 Perry maintained at the hearing that even Respondent's supervisory personnel did not understand NPS. This assertion is somewhat substantiated by the record. For example, Mohip testified that it was "very arbitrary as to which calls [were] chosen" for the survey and that he had no idea how the customers were selected. This was later rebutted by Acting Interim Director Tucci who confirmed that the surveys were sent to all callers who had not been surveyed within
 35 the prior 30 days.

Perry's 2015 Email to CEO Dolan

40 Perry testified, by way of background, that by May 2015, she and her coworkers located in adjacent work stations began discussing the reimplementation of TAHT and the introduction of the VoC and NPS evaluation metric and the Company's time management practices. Perry testified that the employees also discussed unionization as a way of protecting themselves.

On May 11, Perry composed and sent the following email to Dolan.

45 Dear Mr. Dolan:

It has been three years since I last wrote you (see below). For a few years after your

50 ⁶ Mohip's employment with Cablevision was terminated in July 2015, and he testified pursuant to subpoena.

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address to the TSG department, and the concerns over unionization, it appeared that the unfair management and supervision practices of the department relaxed in favor of the employees. Now it appears that TSG is again reverting back to the tactics it used to dismiss employees on a regular basis. As an example, we were told for a couple of years that we should take the time needed to resolve all of the customer's issue, and not to rush the customer off the phone because our performance would no longer be based on handle time. Low and behold the management seemed befuddled that they could not use the metric to terminate people and would even occasionally attempt to coach on the handling time. I once reminded a supervisor that "Mr. Dolan said to take the time to address the customer's concerns", and that is what I try to do. Our customers appreciate the time and need the attention which is why Optimum always scores high marks with J.D. Powers. To begin coaching on handle time will cause many techs to once again rush the customers off the phone leading to many more repeat calls and dissatisfaction with our technical support team. For your information, the low whispers of unionization have begun in the department because the staff is feeling less secure in their positions.

Another matter of concern is the new Genesys system which overall is a nice tool but using it as a timestamp to mark the start of a shift seems to me will cause some legal issues unless the system is perfected. Years ago the Department of Labor won a lawsuit (2004) against Cablevision because employees were told to sign on early to make sure they can begin working at the start of their shift resulting in extra off the clock minutes for which staff was not compensated. Due to the introduction of Genesys employees are once again being told they can sign on a little early to ensure they are completely signed on and clocked in on time. Even if you sign into your computer at your appointed time, you are given two minutes to complete the computer sign-on process and also the Genesys sign-on process or else you are late. I have personally sat at a computer that I've never used, signed on at my appointed time, and the sign on process to the computer, because a new profile was being built, took at least 3 minutes to complete. By TSG standards, I was late because the computer applications did not open quick enough to allow me to sign onto Genesys. Why? I have no control over the systems deployed to TSG or the applications installed. For this reason, the management of TSG believes that allowing employees to sign on early will resolve this issue. Have they considered the legal implications? Probably not. Has Cablevision been given a waiver by the Department of Labor since the last lawsuit? It seems there is a simple fix called single sign-on. Sign into the computer and it signs you into Genesys immediately, or else give a grace period longer than two minutes for sign on, or else continue to use the aspect for punching in. Sometimes it is the new managers that are not aware of the history of Cablevision that repeat undesirable actions which lead to unnecessary legal actions. TSG management should be advised that "Extra minutes of off-the-clock time before or after a shift can result in a substantial back wage liability for employers." Corlis Sellers, a Northeast regional administrator for the department, told Newsday.

Moving forward, regarding VOC (Voice of the Customer), I cannot deny that the introduction of VOC is a good idea, but it seems that TSG representatives have an 80 percent chance of failure and only a 20 percent chance of being successful. A score of 1 through 6 is a failure, 7-8 is neutral and doesn't advance our position, so it might well be used to fail us. We must score 9 or 10 to be successful or we are not contributors. What sense does that make when a customer could potentially give a rep low marks because they don't like the pricing plans or have issues with the service? How is the representative responsible for pricing, faulty systems, infrastructure? Why should a tech fail because the customer feels that Optimum is failing them? This is once again a tool that will cause many good techs to be terminated because the VOC system has not

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been perfected. I do not believe that management/supervisors really understand the system themselves, but it's a tool to "measure employee performance" and a good tool to use as grounds for dismissal of people struggling to make it. The supervisors are forced to use the tool by management who do not really seem to know or understand how to harvest the data to move the company forward. Again, the little people suffer while they try to figure out what to do with the data. The suffering of the little people is what makes the whispers of "unionization" become a reality.

What bothers me most about TSG is when I am told "don't contact Mr. Dolan." And I ask "Why? Have we dirty little secrets in this department? Maybe it is time for you to take another look at TSG, have another walk through and yet another conversation with our (TSG) department. It would certainly be appreciated.

Thank you.

Thus, in Perry's email she referred to employees' concerns about the reimplementation of TAHT, a new computer-based timekeeping system (Genesys) that she believed forced her, and other employees, to work off the clock as well as her perceived unfairness regarding the calculation of the VoC metrics and how these might be utilized against employees. Perry also made specific reference to the "whispers of unionization" on two occasions, linking these to perceived unfairness regarding terms and conditions of employment.

Perry testified that she did not consult with any of her coworkers prior to sending the email or afterward but news of it spread and her fellow employees expressed appreciation for her having done so.

The record shows that Mohip was consulted by his superiors regarding Perry's email to Dolan and her possible intention to send additional communications to him. For example, on May 12, HR Manager Francesca Prochazka sent an email to Panno as follows:

I just called Val at home and spoke with him regarding Dorothea. He did share that Dorothea does often complain that she is going to reach out to Mr. Dolan, so he tends not to take her too seriously. Val stated that he never tells her not to write a letter, but explain that if she has a concern she should feel free to escalate them to him or the TSG Management team. Val confirmed that Dorothea did mention yesterday that she "may" write another letter. I did share with Val that he should always bring issues like this up to myself or his Manager immediately.

I also asked what issues Dorothea was concerned about, and Val stated NPS and Genesys sign on. Val shared that he has explained NPS to Dorothea many times, but she is still concerned. In addition, he encouraged her to visit Shane at one of his "Ask NPS" sessions in the break room. Val also stated that in regard to Genesys, he has gone over with Dorothea that there is a log in window. He will be arriving tonight at 5:30 pm to speak further.

On May 20, Panno forwarded an email which had been sent to her by Manager Gilbert Vega to Acting Interim Director Tucci and Director of Operations Milton Lopera as follows:

If you are in tomorrow, can we meet about Dorothea? I just spoke with Val and he said he spoke with her yesterday and she said there are still things that she would like to mention to Mr. Dolan that she did not include in her last e-mail. Val said she would not elaborate. He indicated that he would follow up with her tonight.

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I again coached Val on letting me know about these things when they happen. He owes me an update after his meeting with her tonight.

5 *Perry's Organizational Efforts on Behalf of the CWA*

During May 2015, Perry also reached out to CWA representatives to inquire about how employees could become part of the Union. She spoke with Union Representatives Tim Dubnau and Zelig Stern, who had been trying to organize employees in Cablevision's other Long Island facilities. At this time, according to Perry's testimony, she began speaking with coworkers during breaks and downtime between calls. She told employees that the CWA had a meeting planned for the third week of May at the food court of a local IKEA store, one at the CWA office in Farmingdale, New York for the last week in May and another scheduled to be held at a Dunkin Donuts facility close to the Jericho facility in early June. Perry testified that she collected employees' email addresses and communicated with them in this fashion.

Former Cablevision employee Nadine Gyles, whose testimony will be discussed in further detail below, stated that she had a discussion with Perry in the restroom toward the end of May. Gyles asked Perry if she had heard about anyone going around wanting to organize a Union, and Perry replied in the affirmative, that she had been in contact with the CWA and they were trying to organize a meeting. Perry asked Gyles if she wanted to get involved, and Gyles replied no. Perry nevertheless asked for Gyles' email address, told Gyles there was a meeting planned at the Dunkin Donuts in Jericho and provided her with contact information should she be interested in attending.

Perry and Gyles sat close to each other at work and, as Gyles testified, Perry spoke with her about union meetings and asked her to forward the email she sent to Gyles to other employees but to be careful about whom she sent it to.

Union Organizer Stern testified that Perry reached out to the CWA and subsequently began organizing employees by encouraging them to attend union meetings. He confirmed that Perry was his primary point of contact at the Jericho facility.

Respondent's Investigation of Perry's Work History

As noted above, Perry sent her 2015 email to Dolan on May 11, shortly after 2 pm. Within the half hour, Perry's message was forwarded to executive vice-president of HR, Sandy Kappell, who in turn then forwarded it to senior vice-president of HR Paul Hilber. Hilber was asked to "get us the facts." And Hilber, in turn, sent an email to Panno requesting that she "[p]lease have this investigated immediately."

Panno then began reviewing Perry's employment records. Panno explained in her testimony that this was pursuant to preparing an "escalation summary" which is a document triggered by an event which causes senior management to anticipate that "something needs to be outlined regarding an employee relations incident." Panno acknowledged that the triggering event for the escalation summary was Perry's email to Dolan, and no investigation had been underway prior to that event.

Panno testified that the investigation conducted into Perry's work history was typical of the manner in which complaints to the CEO are investigated, but offered no other specific examples to substantiate this assertion. Panno testified that after she reviewed Perry's email to Dolan she determined that the issues that required investigation were the Genesys timekeeping

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system, certain alleged unfair supervisory practices, and the NPS metrics.

Panno's investigation continued into Perry's employment history. She asked the Company's disability analyst, Scott Rosinger, to "pull" Perry's requests for Family Medical Leave Act (FMLA) usage. She also instructed Lopera to summarize Perry's "outlier" performance on Company metrics. The response Panno received from Lopera, on May 11, 2015, at approximately 8 p.m. was as follows:

Outlier PERFORMANCE – Dorothea Perry

Feb. ranked 339 of 679 – 50th percentile TCP Recommended action – none (ADH, IDLE)

Mar. ranked 649 of 679 – 5th percentile TCP Recommended Action – coaching (NPS, ADH, OSATM Quality, Personal Time)

Apr. ranked 368 of 672 – 45th percentile TSP Recommended Action – coaching, (NPS, ADH, AHT, OSAT)

Action Plan is to be drafted for NPS and OSAT but no action recommended in TCP for May as NPA so far is 100 (1 survey).

Other emails ensued. One contained a graph documenting Perry's performance relative to that of her peers and included coaching notes from Mohip, her supervisor at the time, which were documented during the period from March 23 through April 23, 2015. These notes refer to a variety of issues which are of little meaning to me, not understanding the particulars of the business enterprise. Nevertheless, there is no indication in these coaching notes that Respondent was, at the time, contemplating disciplining or discharging Perry for any perceived deficiencies in her performance.

On May 11, Panno exchanged emails with Tucci and Lopera, among others, regarding Perry's rankings. Although the entire context of their discussion is unclear and unexplained in the record, it was noted that, as of her last performance appraisal, Perry was ranked 289 out of 462 TSRs in the Jericho facility.

On the following day, May 12, HR Manager Francesca Prochazka reported to Panno that she had spoken with Mohip, who reported that Perry had told him that she had planned to reach out to Dolan, but due to the frequency of her complaints in this regard, he tended to not take her too seriously. Prochazka noted that she told Mohip that such issues should be brought up to her or his manager "immediately." Mohip was asked what issues Perry was concerned about, and he referenced Genesys and NPS. Mohip asserted to his superiors that he had explained NPS on numerous occasions and encouraged her to visit one of the "Ask NPS" sessions in the break room.

On May 11-12, Respondent conducted a review of Perry's attendance records and medical leave accommodations. This review involved Panno and Hilber, among others. It was noted that, based upon her work schedule, Perry did not qualify for FMLA but did qualify for and had sought an accommodation for time off under the ADA. Panno sought to learn whether Perry had exceeded her allowed time and was advised that Perry's leave requests were within the accepted parameters for intermittent time off.

Respondent's managers continued to monitor Perry throughout the period of time preceding her discharge. As will be discussed in further detail below, communications were exchanged among various managerial personnel on May 14, 15, and 18. An email dated May 20 shows that Vega asked to meet with Panno relating to Mohip's most recent discussions with Perry regarding items she still wanted to raise with Dolan. Mohip was planning on conducting a

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follow-up meeting and reporting back to his superiors after that occurred.

Conflicting Evidence Regarding Knowledge of Union Activity at the Jericho Facility

5 Respondent has consistently maintained that there was no union activity at its Jericho facility and it had no knowledge of such. To this end, Panno testified that at about the time Perry sent her email to Dolan referencing "whispers of unionization," Lisa Gillingham who at that time was a new senior vice president, conducted town hall meetings. In addition, Tucci was conducting focus groups. Lopera was conducting training. As Panno testified, all three verified
10 that they had not heard a single mention of unionization. Nor had Prochazka, other members of the HR team or "any of the other managers, all of which I spoke with." There were additional denials adduced on the record from lower-ranking members of Respondent's supervisory staff, which will be discussed below.

15 Perry testified that during a one-on-one with then-Supervisor Mohip, another TSG supervisor, Anthony Maharaj, approached her and said that he had heard that Perry had information regarding a union meeting, and asked for the information, stating that another employee wanted it. Perry wrote the information on a piece of paper and gave it to him, telling him to be "be careful." As Perry testified, this was all in the immediate presence of Mohip who
20 was seated only inches away. Perry testified that at some point during this brief exchange, Mohip turned to look at them, but said nothing. Several minutes later, during the same interview with Mohip, Maharaj returned with another nonsupervisory employee, introducing him as "[his] boy," telling Perry that the employee was interested in the union meeting and asking for information about it. Perry further testified that she began again writing the information on a
25 piece of paper and Maharaj told her not to worry and she could trust the employee Maharaj brought to her. Perry then continued her meeting with Mohip who asked her what their interaction was all about and Perry responded, "Val, you don't want to know."

30 As Perry recounted, she stopped by Maharaj's desk on her way out of the facility, asking if he wanted to see her again. Maharaj replied "yes" and began identifying various employees whom he believed were trustworthy and in favor of the Union. As he did so, he led Perry around the call center floor and, as Perry asserts, the employees acknowledged her and nodded their head. Perry decided that their email addresses should be collected by one of these employees and given to her at a later time.

35 Perry further testified that before she left the facility that evening, Maharaj advised her that there were workplace issues she should address with senior management, particularly in regard to the new performance metrics being introduced. Perry took notes about what she discussed with Maharaj that evening and asked Maharaj why he was helping her. Maharaj
40 replied that he thought certain things were being done unfairly in the workplace.

Counsel for the General Counsel adduced testimony from Perry's former coworker, Gyles, which it contends corroborates her assertion that Respondent's supervisors had knowledge of her activities on behalf of the Union. Gyles was not at work on the evening of
45 Perry's termination, but when she arrived to work the next day, the facility was abuzz with the news (as will be discussed below, this was not a quiet affair).

About 1 week after the discharge, Gyles went to speak with Mohip, her supervisor at the time, who was sitting with Maharaj. Mohip shushed him and Gyles asked why. As Gyles
50 testified, Maharaj said that she would not like to hear the things Mohip was saying about her. Gyles pressed further, and Maharaj replied that Mohip stated that Gyles was "in cohorts" with Perry in organizing the Union. Gyles testified that she feared she could be fired if someone else

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heard such talk and told Mohip to stop it. She then asked if Perry had been discharged because it had been found out that she was engaged in union activity, and Mohip replied that from what he understood, that was the case.

5 Gyles further testified that several days later, Mohip again teased her for being involved with Perry and the Union. Shortly thereafter, in June, Gyles learned that she was being assigned to a new supervisor, Reneiro Cecora. At one point Gyles was walking along the floor with Mohip. They stopped at Cecora's desk and Gyles commented that she would now be on his team. As Gyles testified, Mohip stated that Cecora did not want Gyles on his team because
10 she was "in cohorts" with Perry and the Union. Gyles asked that Mohip refrain from such comments because she feared she might be fired, and from that point on he made no further such references.

15 For their part, supervisors Cecora, Mohip and Maharaj all denied that they had any knowledge of Perry's union activities before the discharge and denied that had either made or witnessed any of the statements regarding Perry's union activity attributed to them by Gyles.

20 Cecora, called as a witness by Respondent, testified that going back to May and June of 2015, he was unaware of any union activity going on at the Jericho facility. He further testified as follows:

Q [by Respondent's counsel]: Were you aware of any connection between Ms. Perry and [the] union or union activity at any time prior to the time when her employment ended?

25 A: No.

Q: Did you ever witness a conversation between Ms. Gyles and Mr. Mohip regarding the circumstances of Ms. Perry's leaving the company?

A: No.

30 Q: Were you aware of any connection, at that time, that is May and June [of 2015] between Ms. Gyles and a union?

A: No.

Q: Did you ever witness a conversation between Ms. Gyles and Mr. Mohip regarding the circumstances of Ms. Perry's leaving the company?

A: No.

35 Q: Did you ever witness a conversation between Ms. Gyles and Mr. Mohip regarding the reasons that Ms. Perry was gone from the company

A: No.

Q: Did you ever witness a conversation between Ms. Gyles and Mr. Mohip regarding unions?

40 A: No.

Q: Did Mr. Mohip ever tell you anything like the following, you don't want Ms. Gyles on your team because she in cohorts with Dorothea and the union, you don't want her on your team?

A: No, not at all.

45 Q: Did Mr. Mohip ever tell you anything like that?

A: No.

Q: did you ever hear Ms. Gyles express any concern that she might be terminated for union activity?

A: No.

50 Q: Did you ever hear Ms. Gyles say if Ms. Perry or if Dorothea got fired for union activity, someone can go back and say, oh, I heard Nadine was part of it too and then I'm going to get in trouble too? Did you ever hear Ms. Gyles say anything like that?

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A; No, not at all

Q: Mr. Cecora, do you know the reason that Ms. Perry is no longer employed at Cablevision?

A: No, I don't know.

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Following a similar line of questioning by Respondent, responding with primarily one word or brief answers, both Mohip and Maharaj testified denying the substance of the accounts proffered by Perry and Gyles, essentially denying that any of the discussions they recounted ever took place or that they had any knowledge of Perry's union activities. Their answers consisted primarily of the following sort of responses: "No"; "Never" and "I did not." For example, Maharaj denied ever interrupting a one-on-one Perry had with Mohip; that he ever asked her for or was provided with information regarding a union meeting; that he ever heard Perry and Mohip discussing anything relating to a union; that he ever identified anyone who might be interested in joining a union; that he was either aware of any employee that might be interested in joining a union and further stated that he never provided Perry with topics of discussion with management.

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Maharaj further denied having any discussions with Mohip and Gyles regarding the circumstances surrounding Perry's discharge; denied that Gyles asked why Perry had been terminated or that Mohip stated any reason.

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He additionally denied having a conversation with Mohip and Gyles concerning Gyles' support or nonsupport for a union or stating that Mohip had stated that Gyles was "in cohorts" with Perry in organizing a union.

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In a similar vein, Mohip denied hearing Maharaj request information from Perry about a union meeting, and stated that he never saw her provide such information. He denied witnessing an introduction on Maharaj's part referencing another employee who had interest in the Union, and never saw any employee requesting such information from Perry. He did acknowledge that he might have witnessed a conversation between Perry, Maharaj, and another employee after which he asked what it was all about, but did not recall the response to that question.

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With regard to Gyles, Mohip denied having any conversations with her regarding the reasons for Perry's termination. He said she "probably" did ask, and a lot of people asked the same question, but he did not "give anyone an answer." He denied having a conversation with Gyles and Maharaj regarding the reasons for Perry's termination or that Maharaj ever said, in his presence, that he (Mohip) stated that Gyles was "in cohorts" with Perry in organizing a union or that he ever made comments to such effect to Maharaj.

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Mohip later stated that Gyles "probably" asked if Perry was fired because she was involved in union activity and he said, "no."

Mohip further denied having a discussion with Cecora in Gyles' presence regarding a union or telling him that he would not want Gyles on his team because she was "in cahoots" with Perry and the union.

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Panno and Perry Meet

On May 18, Panno invited Perry to meet with her at the Jericho facility that evening at the start of her shift. They met in the HR office, with no one else present. As Perry testified, Panno began the meeting by thanking her for her email and advising her of issues she was not

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aware of. Panno also told Perry that before they discussed the email further, she wanted to build a rapport, so that that the two of them could more easily "open up." Panno then proceeded to tell Perry some personal information about herself, which Perry recounted in great detail at the hearing and which was not denied by Panno, and Perry responded in kind. After about a half-hour, the two proceeded to a discussion of Perry's email to Dolan. Perry testified that she told Panno that employees were worried for their jobs because of what they perceived as unfair treatment of employees by management, particularly the use of certain performance metrics and, as a result, they were talking about forming a union. During the meeting the two discussed the Cablevision Brooklyn employees, who were by then unionized and Panno brought out that those employees were subject to the same performance metrics as all other employees. Perry testified that Panno told her that the Brooklyn employees were attempting to decertify the Union; however, Panno denied making such a comment. Perry further testified that she responded that she had prior experience working with unions and in her opinion a union could be helpful to the Jericho call center employees. According to Panno, the context of their discussion of unions was limited to the Brooklyn employees and performance metrics.

Perry and Panno also discussed the issues she raised in her e-mail to Dolan: the reinstitution of the TAHT performance metric; the way in which the Genesys log in required employees to work off-the-clock and VoC and the NPS metric. Perry maintained that employees felt that the VoC/NPS metric was unfair to employees. Panno responded that the Company strongly supported this metric. Panno asked Perry whether she had received training on NPS. Perry responded that she had not, and the closest she had come to an NPS training session was when she had inadvertently entered such a meeting for a brief period of time to take some of the fruit offered to employees. Perry testified that she told Panno that she had taken an online training course regarding NPS but that it was ineffective and that she as well as other employees and supervisors did not fully understand the program.

Perry testified that Panno told her that she saw her as a leader and asked her whether she ever attended any focus group meetings which were designed for management to meet with employees and share information and voice opinions on various programs implemented by Respondent. Perry responded that she had not been a part of any focus groups, but no number of focus group meetings would change her position regarding the fundamental unfairness of NPS as a performance metric.

Perry asserted in her testimony that Panno told her that she had reviewed her performance metrics and that they were good. Perry also stated that she told Panno that the issues she raised with Panno were not related only to herself, but reflected the concerns of her coworkers. Perry asserted that at no point was she advised of deficiencies in her performance that might result in her discharge. Panno offered no testimony to contradict Perry's testimony in this regard. The meeting between the two lasted for over one and one half hours.

As Panno testified, during the meeting she spoke with Perry about the three areas of concern that Panno had identified in her email. With regard to Perry's stated concern that Genesys required her to log in early, Panno conducted an investigation and discussed the matter with the Genesys administrative staff. The Company thereafter reviewed the log in procedures and decided that it would be helpful to provide additional training on Genesys. One week later, an email was issued to employees to advise them of the proper log in procedures.

As to the VoC/NPS issue, Panno confirmed that Perry had advised her that she thought the system was unfair and would be a way to terminate employees and that she was opposed to it and thought it unreasonable. According to Panno, Perry also acknowledged the importance of such metrics. Panno acknowledged that at some point, during their discussion of company

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metrics, she told Perry: "you get it." As Panno explained, "I was referring to the fact that she was a ten year experienced representative and that she understands the importance, as she even said to me, of these metrics and these measures and why we're doing this relative to the customers." However, Panno also testified that Perry had told her that she had only gone to
 5 NPS training to get the fruit that was provided to employees. Panno testified that she found this comment "rather flippant, given the importance of NPS."⁷

Panno testified that she recommended that Perry attend additional information and training sessions but that Perry told her that she was not interested and had no intention of
 10 attending such sessions. Perry additionally made clear that she would not attend focus groups regarding NPS and reiterated her belief that the metric was unfair to employees. Panno further testified that she offered Perry the opportunity to meet individually with Tucci and Regional Vice-President Monte Jiran, but Perry declined those opportunities.

Perry had additionally complained about "unfair management and supervisor practices" in her email to Dolan. Panno questioned her about various supervisors. Perry referred in particular to Supervisor Gina Spaulding who she felt had unfairly disciplined her; however, she spoke approvingly about her current supervisor (Mohip) and two other managers. After some
 15 additional information, Panno confirmed there was no further action required as to this particular issue. Panno additionally spoke with Mohip regarding Perry's assertion that she had been told not to contact Dolan and Mohip denied doing so, and further stated that Perry repeatedly stated that she was going to contact Dolan.
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Panno acknowledged that during this meeting she brought up the subject of unions based upon the two references to such in Perry's email. Panno testified that she told Perry her own opinion of unions and informed her that the same performance metrics were being applied across the Company, including at the unionized Brooklyn facility.
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The Continuing Investigation of Perry's Work Record

30 After her meeting with Perry, Panno contacted various senior executives including Hilber, Gillingham, Tucci, Company in-house counsel Rochelle Noel and Manager Gilbert Vega.

Panno testified that she learned from Vega, Tucci and Lopera that Perry was "struggling" and her NPS scores were significantly lower than those of her peers. She was characterized as
 35 an "outlier" and had been flagged for additional coaching by Mohip in February and March. By April, Respondent had been considering drafting an action plan. Specifically, Perry's normalized NLS score for March was 17.9 percent, compared to 54.8 percent for her peer group; for April her score was 20.9 percent compared to 54.9 percent for her peer group and for May, 19.2 percent as compared to 54.9 percent for her peer group. Tucci testified that Perry's score was consistent and "not something conducive of somebody making improvement."
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Panno testified that between Perry's May 11 email to Dolan and her June 8 discharge, she had multiple meetings and telephone calls regarding Perry with Respondent's high-level
 45 officials and personally spent some 20 hours on this investigation. Additionally, members of Panno's HR team spent significant time on the investigation as well.

On May 25, Perry sent another email to Panno stating, in part: "NPS is one of those metrics that is completely unfair to the tech and I stand by that no matter how many focus
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⁷ As noted above, Perry had previously made a similar comment to Mohip.

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groups you ask me to attend.” Subsequently, on June 8, Perry again wrote to Panno referencing and attaching an article she had read about Comcast and a customer experience survey conducted by that organization. The subject title is “NPS will not improve what Cablevision already excels at.” Perry wrote as follows:

I read this article and wonder how NPS will help to improve what Cablevision has already achieved. Employees are already committed to company goals so much so that Cablevision has once again excelled in Customer Service Ratings. NPS should be used for information purposes, it’s a pointless metric to measure employee performance.

What will help the organization is “Purposeful Leadership: Leaders operate consistently with a clear, well-articulated set of values,” not the flip-flopping that we see too often with Cablevision. As Mr. Dolan’s statements were well documented, he too has unfortunately flip-flopped on his position that “THAT will not be used to measure performance.” How are we to trust management if management can to adhere to its promises?

Panno replied to the email with the following message: “Thanks, I’m here tonight, see you later.” Later that afternoon, Perry emailed Panno that Tucci had asked to meet with her: “Is there any reason why? I have been an employee for over 11 years and he has never even said hello to me. Why now? My experience with him during the first 6 months when I was a temp, was negative. I avoid negative managers. “Panno testified that she took the foregoing communications to evince Perry’s unwillingness to take steps to improve her performance.”

*Mohip’s Coaching Notes*⁸

Mohip testified generally that he discussed the VoC with Perry and that he discussed with her the manner in which she would have to take care of the customer to get a good score. He was not shown, nor was he asked to identify certain notes purporting to reflect his coaching sessions or, as they are referred to, “one-on-ones.” When asked whether he ever told Perry that her performance on NPS could lead to her termination, Mohip testified as follows: “I can’t recall anything, but if somebody is not performing up to par, I would let them know--well, I let all the reps know that NPS is going to be a metric and it’s one of the metrics that can lead to corrective action and then termination eventually.” While Mohip’s coaching notes were not introduced into evidence through him, he was asked to identify certain notes introduced into evidence by the General Counsel which are attached to an email to Vega, dated May 11, incorporating his notes from March going forward. These notes contain charts which purport to reflect statistics relating to Perry’s performance in graphic form. These were otherwise unexplained. The notes recorded discussions relating to VoC, the use of personal time, Perry’s adherence to schedule and TAHT. Perry was advised to offer empathy and assurance to the customer and Perry advised that she will work on being “more friendly and customer oriented.” It was noted that Perry scored 80 percent on “KC”, [presumably “knowledge check”] and it was noted that she “normally does well on these.” On March 23, Perry was ranked as 317 of 703 or in the 55th percentile in her overall metrics.

The coaching notes set forth below are maintained in a Company database called UConnex, which may be accessed by various members of Company management. Those in evidence in this proceeding, and relied upon by Respondent, were introduced into evidence through Tucci, who testified subsequent to Mohip, who had offered no testimony to authenticate

⁸ Minor typographical errors, to the extent they clearly do not reflect a variation in content have been corrected.

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or explain them. The initial portion of these notes reflect various metrics, including Perry's NPS scores which have been discussed elsewhere. The narrative portion of the notes read as follows:

5 Met with Dorothea for her one on one and to go over last month and MTD performance. She has done well to improve her adherence this month. Dorothea is still having issue with NPS. However, MTD her NPS is at 100% with e calls Dorothea and I went over NPS Do's and Don't's

10 I advised her to be Personal and Professional: Whether you have a bubbly personality or more calm and collected, it is very important to be affable when speaking with the customers. Mind your P's and Q's: Being polite, even to the most challenging customers, can go a long way toward improving the interaction with the customer and letting them know that we are interested only in providing them the best possible service.

15 Offer alternatives to Demarcation: If a caller is upset that they are unable to pay their bill on our website due to an issue with their browser for example, after referring them to that browser's support team, we could speak to using other browsers to make the payment and advise of all the other payment options we have available to all our customers.

20 I advised that she not be transactional. When your interaction is solely focused on resolving the issue and not on having a 'real' conversation, many customers will perceive you as robotic and will not feel that you value them as a customer. Come down to the customer's level (Tone of Voice): If the caller is agitated, that may mean that they have had a truly poor experience with us or that may mean they are bringing additional baggage onto the call. Either way, reciprocating the customer's

25 frustration will only make the interaction worse for both parties. Simply educate the customer that the problem is not ours without providing other options: This can lead to the customer feeling as though we are not interested in assisting them; if the customer is experiencing an issue with their picture size on an old

30 4.3 HDTV(SD picture shape, High Definition TV) explain they can get more channels to fit their TV by utilizing a SC Cable Box instead of a HD box. Just advising that, to get past HD pictures at the right size, would require a new HDTV sounds like we are brushing them off. I let her know that she must convey the value of Optimum.

35 Many of our customers are unaware of all the advantages they have as an optimum subscriber and choose to switch to a lesser service in order to save money. It is up to us to EDUCATE and EMPOWER our customers so that they can get the full benefit of the Optimum line. Customers that have been educated on all we offer tend to be Net Promoters and will be happy and satisfied overall, and hence, given good OSAT scores.

40 Dorothea and I went over her AHT. I let Dorothea know that one of her main issues with this is knowing where the point of demarcation is and when to provide alternative means of support to the customer. Dorothea admits that when she gets an old person on the phone, she goes above and beyond and gets in trouble with her time.

45 I also advised that with some customers she spends a lot of unnecessary time discussing things not related to the call. I let her know that she must at some point refer the customer out especially if it is beyond the scope of our support.

50 Her handle time is lower than it was last month but wrap is still high. I advised Dorothea to document while on the call and not use wrap in times of availability. Dorothea states that she will work on leaving non essential material out of her calls. She

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states that she will also be more aware of the demarcation point on the call and leave non essential conversation out of her calls.

Dorothea says that she will also work on her wrap by documenting while on the call.

5 The notes additionally reflect the following:

Dorothea mentioned to me that she is thinking of writing a follow up letter to Mr. Dolan about certain issues that she spoke about with Yvette Panno and some issues she forgot in her letter. She did not go into detail.

10 She stated that she will most likely send it to Yvette and CC Mr. Dolan.

She let me know that she had a very good conversation with Yvette but did not reveal much else except that she told Yvette that she felt psychologically terrorized at times. She also mentioned that she complained to her about getting 2 flings of a wing while working during a PPV event.

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The following notes were initially dated May 13 but are noted to have been subsequently modified on May 29, and provide as follows:

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Dorothea came to me tonight during her break wanting to know in what areas she was low. I let Dorothea know that she was a low performer in VoC and AHT.

She then stated that she did not know much about VoC and NPS. I mentioned that we had a month of meetings and all reps attended at least one. She stated that she did not. I let her know that there were several other sessions to which all reps were invited in case they had any questions. I said to her that if I am not mistaken I am sure that she attended one of the sessions and as I remember it was the one that Shane Abbatecola gave. Dorothea then stated that "she just went to them for the fruit" but did not absorb much. I reminded her that she and I have been talking about NPS and we went over concerns that she had before. Dorothea continued and complained that it is not fair that she is being judged on questions about the company and not on her performance. I went over with Dorothea that she is being ranked amongst her peers and it levels the playing field for all.

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Later on I met with her to let her know that her VoC is at 19.2 and explained that Normalized NPS is calculated in an effort to count fairly against both her peer groups and the type of calls she takes. I went over with her the common NPS concerns again, many of which she had especially that it is out of her control. I advised her to educate the customer and focus on conveying the value of Optimum. I let her know that many of our customers are unaware of all the advantages they have as an Optimum subscriber and choose to switch to a lesser service in order to temporarily save money. It is up to us to educate and empower our customers so that they can get the full benefit of the Optimum product line. I also advised that she utilize soft skills and empathize with the customer since empathy has been the key differentiator between high and low marks from our customers. Lastly I let her know that she must take the time to break down the bill slowly and with confidence. I let her know to check that the customer understands and that she must always provide alternatives.

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Respondent's records contain another set of notes dated May 31. Perry was noted as ranking 500 as of 660 in her net score card, or in the 24th percentile. In terms of NPS she ranked 567 out of 600, or in the 14th percentile. In First Contract Resolution she ranked 142 out of 660. In adherence, Perry was ranked 585 out of 660 and in knowledge check she ranked 452 out of 660.

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The coaching notes continued as follows

Real time coaching should be scheduled.

We went over Dorothea's scorecard. She is ranked 500 of 660.

5 I let her know that she is tracking low on NPS and Adherence.

I advised her to be polite. Mind her P's and Q's and be transactional. I also reminded her that she must be likeable and friendly on her calls.

10 I also advised her to educate the customer and convey the value of Optimum. I let her know that a well educated happy customer will be likely to give good LTR and OSAT scores.

Dorothea states that she will comply.

I also advised Dorothea to remember to work with me on real time exceptions. Dorothea states that she will and will be mindful to adhere to breaks and not go over.

15 Perry denied that the above coaching notes accurately reflect discussions she had with Mohip; that Mohip never gave her the specific instructions on improving her performance reflected therein; that during their one-one-one performance review sessions, Mohip only went over metrics scores with her and advised her about those areas in which her scores were low. She further testified that during their meetings during the months of March, April, and May,
20 Mohip never told her that there were any deficiencies in her performance.

An e-mail from Tucci to Prochazka, dated May 15, setting forth various metrics, ranked Perry overall as 395 of 681, in the 42nd percentile of employees.

25 *Panno's Continued Investigation as to Perry's Email*

Panno offered the following testimony regarding inquiries she made regarding Perry's comments regarding "whispers of unionization":

30 Q: [by General Counsel]: Okay, so there were meet and greets with John Tucci and various employees during the spring of 2015 between April and May, correct?

A: Yes

Q: Okay do you recall when you spoke with him in that regard?

35 A: During the course of each of those meetings, were scheduled daily. So we would periodically check in and see how they were doing – how they were going, excuse me.

Q: So every day you met with him regarding these meetings?

A: Not every day. Periodically

40 Q: And based on what you and Mr. Tucci discussed about those meetings he had with employees, you determined that there was no union activity at the facility – the Jericho facility?

A: That was one of the barometers.

Q: When you say one of the barometers, what do you mean?

45 A: Milton Lopera had been also conducting simultaneously meetings to review the employee survey action plan. He provided me with feedback. And Lisa Gillingham had had some town hall sessions with employees independent of that. And she provided me with feedback as well. And Francesca Prochazka who was there on a daily basis, provided me with feedback as well.

Q: Okay. And what feedback did they provide you?

A: That there were no whispers of unionization.

50 Q: So you asked them about whispers of unionization specifically in response to Ms. Perry's e-mail, correct? E-mail to Dolan?

A: Not specifically, because some of the conversations that took place about feedback

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from the focus groups took place earlier and prior to that –

Q: Okay

A: --but that was—

Q: Those were your discussions with Tucci, correct?

5 A: No.

Q: Okay. Alright. Let's try to break this down. You spoke with Tucci about one that he – excuse me, meet and greets that he had with employees when he – around the time [he] first assumed the interim director position, correct?

A: Correct?

10 Q: And you spoke with Lisa Gillingham about a town hall that she had, correct?

A: I had received feedback, not directly from Lisa per [se] about that town hall, but from Joel Cataldo, for example, who is also with her or Milton or John who were in attendance.

15 Q: Okay. So you spoke with Joel Cataldo about what he learned from Lisa Gillingham's town hall meeting, correct?

A: Some of the feedback from those town hall meetings, yes.

Q: And you asked him specifically about whether he had heard about any union activity in Jericho, correct?

A: Not specifically, no.

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In sum, Panno went on to report that her conversations with the afore-mentioned managers concerned their feedback “in terms of overall morale” and “employee relations.” She denied that she asked Cataldo about union activity at Jericho and that it did not come up in their discussions because it was not raised in any of the focus groups he had participated in with Gillingham. When asked whether she asked any of these individuals how she came to the conclusion (as she had testified on direct examination) that there was no union activity at Jericho, Panno replied as follows:

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Following the receipt of the letter from Dorothea Perry, I specifically asked some of those questions, but some of the previous meet and greets, and some of the previous town hall meeting and some of the previous sessions, it was a broader question around employee morale.

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Panno did acknowledge that after Perry's email she inquired of Tucci, Prochazka, and Lopera whether they had heard of employee feedback, questions, concerns, or anything that had been raised that resembled whispers of unionization.

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The Decision to Terminate Perry's Employment

On June 1, Panno emailed Senior Vice President Gillingham with a copy of the escalation summary which had been prepared along with an apparent recommendation to discharge Perry. Gillingham replied the following day approving the separation, and suggesting a severance package. As Panno testified, this recommendation was arrived at after consultation with Vice President Hilber, attorney Noel, HR Manager Joel Cataldo, Regional Vice President Jiram and Director of Operations Lopera. Prior to emailing this recommendation, Panno and Gillingham had a conversation regarding the discharge. Gillingham testified that during this conversation they spoke about Perry's comments regarding unions and her email to Dolan, but stated that she could not recall further details about their discussion.

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The timing of Perry's discharge was also a topic of discussion. Panno advised Cataldo that she anticipated Perry's discharge would be “noisy” because, as she testified, “it would echo through the organization since many different people were aware of the potential for this

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particular separation to have some repercussions.”⁹

Notwithstanding her recommendation, on June 1, Panno sent an email to Perry stating that she wanted to “reconnect,” and Perry replied on the following day that she would be more
 5 than happy to speak with her. It does not appear that the two actually met again prior to the meeting where Perry was discharged.

On June 8, earlier in the day, Panno met with Tucci and discussed the discharge with him. As Tucci testified, Panno spoke with him about Perry’s email to Dolan and her comments
 10 regarding NPS. Tucci testified that when he reviewed the file notes which showed repeated coachings, he came to the conclusion that Perry was fighting the acceptance of NPS and was not putting in the effort to improve in that area.

Tucci then sent an email to Perry asking that she meet with him when she came into
 15 work for the evening to discuss her recent discussion with senior leadership. When Perry reported to work that evening she attended the meeting after clocking in.

Tucci’s Knowledge of Perry’s Communications with Management

During his cross-examination, Tucci testified that prior to June 8, he had not had any
 20 discussions with senior management regarding disciplinary actions or misconduct regarding Perry. His testimony in this regard was as follows:

Q [by counsel for the General Counsel]: Let’s talk about Cablevision’s decision to
 25 discharge Dorothea Perry. You heard about the decision to discharge Perry from Yvette Panno, correct?

A: Yes

Q: You had a discussion with her, correct?

A: Yes

Q: When was that?

A: Earlier that day

Q: On June 8th?

A: Correct

Q: Had you previously had any discussion with Yvette Panno regarding Dorothea Perry

35 [Objection by Respondent counsel]

Judge: What’s the basis?

Respondent counsel: Regarding Dorothea Perry. I mean that’s a very limitless question.

By General Counsel: Regarding any disciplinary issues relating to Dorothea Perry?

A: No.

40 Regarding any investigation into Dorothea Perry’s conduct?

A: No.

Q: Prior to June 8th, were you aware that Dorothea Perry had e-mailed James Dolan?

A: No.

Q: Did Ms. Panno tell you about that on June 8th?

45 A: It was part of our discussion in preparation for that meeting.

⁹ Panno and Cataldo, among others, considered whether Perry should be terminated immediately or whether Respondent should wait until the end of June, when other discharges were being planned. Panno stated that waiting until that date would place Perry’s discharge ‘in context.’ Upon consideration,
 50 Respondent decided to proceed with the earlier date. On June 4, Panno directed one of her subordinates to process paperwork for Perry’s discharge as soon as “practical.”

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Q: What did Yvette Panno tell you about the e-mail on Dolan on June 8th.

A: We had a quick conversation. That basically she had written a letter, and Dorothea had struggled with NPS, and her trying to say that NPS wasn't a way to measure individuals wasn't a component that should be used. That was really the breadth of it.

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By contrast, Panno testified that she first met with Tucci regarding Perry, "shortly after the receipt of the letter on May 11th . . . and thereafter into June. I see John almost every day almost." When asked whether she had discussions regarding Perry on a regular basis, Panno replied, "No, he provided some of the information up front and validated some of the information and my questions that I had received," Panno additionally testified that Tucci responded to some of the questions she had asked regarding, "the metrics."

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The evidence, moreover, shows that Tucci sent and received copies of numerous e-mails relating to Perry in the weeks prior to her discharge. For example, an email stream dated May 11 shows that there were queries regarding Perry's "ranking in shift alignment." Tucci emailed Panno that as of Perry's last performance appraisal Perry "ranked 289 out of 462 reps" As Tucci generally denied having such exchanges, they were otherwise unexplained.

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On May 12, Tucci was a recipient of an email sent from Prochazka to Panno regarding a discussion she had had with Mohip. This email has been noted above, but I have restated it here for ease of reference:

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I just called Val at home and spoke with him regarding Dorothea. He did share that Dorothea does often complain that she is going to reach out to Mr. Dolan, so he tends not to take her too seriously. Val stated that he never tells her not to write a letter, but explain that if she has a concern[s] she should feel free to escalate them to him or to the TSG management team. Val confirmed that Dorothea did mention yesterday that she "may" write another letter. I did share with Val that he should always bring issues like this up to myself or his manager.

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I also asked what issues Dorothea was concerned about, and Val stated NPS and Genesys sign on. Val shared that he has explained NPS to Dorothea many times, but she is still concerned. In addition, he encouraged her to visit Shane at one of his "Ask NPS" sessions in the break room. Val also stated that in regard to Genesys, he had gone over with Dorothea that there is a log in window. He will be arriving tonight at 5:30 pm to speak further.

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Tucci was also a recipient of an extensive email sent on May 18 from Vega to Panno regarding May 13 coaching notes which echo, virtually word-for word, the coaching notes (noted to have been revised on May 29) which have been set forth above.

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On May 14, Tucci was a recipient of an email stream sent from Panno to Vega, Lopera, and Prochazka relating to comments Perry had made to Mohip via email regarding "Agility Goals" as follows:

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I have reviewed my 2015 goals and I understand the expectations for my role at Cablevision and the appropriate methods for achieving these goals. I understand my role at Cablevision and the appropriate method of achieving the goals but it is my personal opinion that management's implementation of systems that are supposed to measure my performance makes me so paranoid that I am merely focusing on my survival here at Cablevision. My goal is survival.

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Lopera asked Prochazka to follow up and speak with Perry, but she demurred citing another “open issue” she wished to discuss with Panno. Later that same day, Panno confirmed that there should be no further discussion with Perry.

5 Tucci was also a recipient of an email sent by Mohip to Vega, which in turn was sent to Panno and Lopera on May 15 regarding Perry’s intention to continue to communicate her concerns to Dolan, through Panno with copies to Dolan. The substance of this email is reflected in the file notes which have been set forth above. Tucci additionally received an email on May 15 from Panno requesting that they discuss Perry and an email relating to Perry’s apparent request that Cablevision provide sufficient food for its employees at a special event at which they were asked to work.

Perry’s Discharge

15 The termination meeting was held in a conference room located in the HR office suite. Tucci testified that he was provided with and then raised a series of talking points to Perry, which were notated on a document introduced into evidence by Respondent. They read as follows:

20 Spoken about performance
Indicated you disagree with our business direction specifically NPS d. measures of success
Made it clear you have a fundamental unwillingness to support our vision to help the company impose its [unclear] the team.
25 Senior leadership

Perry testified that Tucci, Panno, and Prochazka were present.¹⁰ Tucci testified that he read from the above noted prepared talking points, telling Perry that she had been spoken to about her performance and that she had indicated that she disagreed with the Company’s business direction concerning NPS and had demonstrated a fundamental unwillingness to support the Company’s vision and improve its customer service.

30 Perry testified that Tucci told her that he called the meeting because Perry had some communications with senior management and he wanted to follow up on that.¹¹ Perry then started explaining the issues she had raised in her email to Dolan and Tucci responded by stating that Perry was being terminated because she did not “believe in the direction of the company.”

40 According to Perry, she asked if she was being terminated because she had done something bad, or if there was a problem with her metrics. Tucci replied that the discharge had nothing to do with her metrics and was because she did not believe in the direction of the company. Perry pressed on for a further explanation and Tucci remarked that she had used “strong words.”¹² Perry testified that at no point during the meeting did any of the managers present explain what they meant when they told Perry that she did not believe in the direction of

45 _____
¹⁰ Tucci and Panno both testified that Prochazka was not there initially, but joined the group after Tucci subsequently left the room.

¹¹ Although Tucci denied mentioning Perry’s email to Dolan, there is a reference to “senior leadership” in his notes.

50 ¹² Tucci testified that this reference only came up after Perry became upset during the meeting and accused Panno of lying to her and setting her up for the meeting.

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the company.

Perry asked whether she was being discharged because of her email to Dolan, and there was no response to this point. Perry became upset. She and demanded to know why she was being discharged. She also told Panno that she had trusted her after she and Panno had shared the personal information during their May 18 meeting. Panno, who did not otherwise testify in detail regarding what occurred during the discharge interview, stated that when informed of her discharge, Perry raised her voice and gestured with her hands. She accused Panno of "set[ting] her up" and said that she wished Panno nothing but bad luck because she had fooled her in an effort to terminate her. It was at that point, according to Tucci, that he advised Perry that those were "strong words." Shortly thereafter, Perry demanded that Tucci leave the meeting, which he did. Security was summoned and Panno and Prochazka attempted to review with Perry a severance package which had been prepared. These efforts proved unsuccessful

Two security guards then proceeded to escort Perry out of the facility. On her way back to her desk, to collect her personal belongings, Perry walked across the call center floor with Prochazka and the two security guards, past a number of her coworkers. As Perry testified, she exhorted, "Do not trust James Dolan! Do not e-mail James Dolan! Do not contact Human Resources! They are not here to help you! If you have any problems, do not say anything or you will be terminated like me!" Prochazka apologized for the outburst, and Perry was then escorted from the building by security.

Gyles' testimony about events following Perry's discharge

Gyles testified that during the week following Perry's termination, she observed that the company-owned computers located on the two desks where Perry usually sat while she performed her duties had been removed. She did not personally observe their removal. Gyles testified that she had only previously been aware of such actions when a computer required repair. The computers remained off the desk for approximately one week. None of the Respondent's witnesses testified to rebut or otherwise clarify this testimony.

Gyles additionally testified to conversations she either had, or observed, among various supervisory personnel of Respondent, including Mohip, Maharaj, and Cecora in the days following Perry's termination. The substance of her testimony in this regard is set forth above.

Analysis and Conclusions

Contentions of the Parties

Counsel for the General Counsel has argued that its witnesses gave consistent and corroborated testimony which should be credited, in contrast to the testimony of Respondent witnesses due to their lack of specificity and corroboration by other evidence. General Counsel has further argues that it has met its burden under *Wright Line, Inc.*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), of showing that Perry's discharge was unlawful. It is further argued that Respondent's asserted rationale for the discharge is pretextual and evidence of its unlawful motive and that Perry was subject to treatment disparate from that given to her peers.

As will be discussed below, Respondent has advanced numerous challenges to Perry's credibility based upon both the substance of her accounts of events and her demeanor while on and off the witness stand and has argued that her testimony should be rejected in its

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entirety.

Respondent contends that, as an evidentiary matter, the General Counsel has failed to meet its burden under *Wright Line*, supra, that Perry's discharge was motivated, in whole or in part, by any union or protected, concerted activity and that the evidence shows that the discharge was a result of Perry's lack of "skill" and "will." Respondent asserts that Perry's employment was terminated solely because of her poor performance as compared to that of her peers, in particular with regard to the NPS metric, and her rejection of the premise of NPS. Respondent maintains that Perry refused to undertake necessary training or take advantage of any of the opportunities that the Company made available to her to help her improve.

Respondent further argues that there is no evidence showing disparate treatment or pretext. Finally, Respondent argues that even if I were to conclude that Perry's discharge was discriminatorily motivated she would be ineligible for reinstatement due to her willful violation of a sequestration order issued at the outset of the hearing as well as her falsification of claims on her job application. Counsel for the General Counsel disputes these latter points, again, as will be discussed below.

General Credibility Determinations

Dorothea Perry

Respondent contends that Perry was a highly evasive witness who came to the witness stand to advance her own agenda, refusing to answer questions in a direct manner attempting to inject unnecessary detail. As Respondent correctly notes, I was on multiple occasions, constrained to admonish her (particularly during her cross-examination) to answer questions directly. It is not clear to me whether Perry was not adequately counseled as to the proper manner of testimony, or she refused to obey instructions. In any event, Perry was frequently her own worst enemy in this regard. Thus, Respondent has taken the opportunity, in its posthearing brief to document the numerous occasions where I directed Perry to simply answer the question posed to her rather than offer the answer she wished me to hear and consider, or make part of the record.

Respondent also points to what it asserts to be various inconsistencies in Perry's testimony on direct, cross, and rebuttal examinations. These include her so-called "application fraud," (which will be discussed below); her testimony regarding the company's lack of reaction to her 2012 email; her testimony regarding her opinions regarding the discharge of a coworker; her asserted ignorance of NPS; her "standard accusation" of pornography in the workplace; her "outlandish" fruit anecdote; an email that Perry claimed to have sent to Panno, which a Company discovery manager opined had never been sent,¹³ and Perry's assertions that she had no time to read emails generated by Respondent about NPS.

As to the former point, it is the case that it often seemed as though Perry viewed these proceedings as a vehicle for the airing of grievances, past and present. Nevertheless, as will be

¹³ This email asserted to be a follow-up to their May 18 meeting, stated in relevant part, "there is still the rumbling of unionization." The document in evidence is an email sent from Perry's Cablevision account to her personal email account. Panno denied receiving this correspondence. Chris Koyl, respondent's discovery manager testified that there was no evidence that this email appeared in Perry's sent items, in Panno's inbox or in either of their deleted items folders. Accordingly, I find there is sufficient doubt as to whether Perry ever sent this message to Panno and do not rely upon it.

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discussed below, despite her voluble accounts of several matters, she demonstrated on various occasions a clear memory of events. By contrast, some of her accounts I find to be exaggerated. Notwithstanding the foregoing, I credit Perry on certain of the central portions of the General Counsel's prima facie case. In particular, I credit her as to the circumstances under which she wrote to CEO Dolan on May 11; her nascent activities in support of the Union; her discussion with Panno during the May 18 meeting and their communications thereafter and what occurred during her termination meeting on June 8. In this regard, I note that much of this testimony was either not rebutted and was frequently corroborated. Gyles, whose testimony I largely credit, as well as Stern, corroborated that Perry was discussing union matters and distributing information to her coworkers. Panno largely corroborated Perry's extensive testimony regarding their discussion on May 18; in particular, the discussion they had about the Brooklyn unionized employees. In addition, Panno did not specifically deny the other references to unions brought up by Perry on this occasion.

With regard to Perry's testimony regarding her interactions with Maharaj and Mohip, I credit some but not all of such testimony. Absent some additional testimony about customary practice and context, I find it inherently improbable that Maharaj and Perry would have a conversation about a union meeting, including a request for information about such a meeting during Perry's one-on-one review with her immediate supervisor. I note that Perry testified that this occurred while her supervisor was seated only inches away, but that he tolerated the interruption and said nothing. I further discredit Perry's testimony that Maharaj returned during the same interview with a fellow coworker, introducing him to Perry during that period. I do, however, generally credit Perry's testimony that Maharaj gave her information regarding employees who might be interested in the Union (and accordingly discredit Maharaj's blanket denials). This crux of this determination is based largely upon the corroborating testimony offered by Giles as to the supervisors' stated knowledge of Perry's union activities and my determination that Giles is worthy of credit, as discussed below.

I additionally credit Perry's testimony insofar as she denied certain details of the coaching notes which have been set forth above. In this regard, I note that Mohip, their ostensible author, was never asked by Respondent asked to authenticate, identify, explain or otherwise comment on such notes. I find that such a failure raises doubts as to their authenticity.

Nadine Gyles

Respondent challenges Gyles' credibility based upon the asserted fact that she obtained her current employment, with the New York City Department of Information Technology and Telecommunications (DoITT) through her contact with Perry. The evidence establishes that Perry provided Gyles with information, including contact information about this agency, but fails to show that Perry was otherwise influential in the decision to employ Gyles. Respondent further points to the fact that Gyles left her employment with Cablevision because she was unable to provide sufficient documentation to support a leave request, and expressed dissatisfaction with her exit interview. The evidence shows that on August 20, Gyles sent an email to Prochazka in which she expressed frustration and disappointment with the way the HR staff had handled her exit interview. However, Panno acknowledged that she and Prochazka subsequently had a conference call which constituted a second interview after which Gyles stated that she was very satisfied. Respondent additionally adduced testimony that during her years of employment Gyles had received 11 prior disciplinary actions. However, these are not asserted to have been part of the reason that Gyles left the Company.

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I found that Gyles was a very credible witness, in many respects the most credible witness I evaluated during this hearing. Her demeanor on the witness stand was direct, thoughtful and considered. I do not believe she demonstrated an animosity toward Cablevision or a particular preference for Perry which would call her testimony into doubt. I note that she denied supporting the Union to both Perry and to supervisory staff, and credit her neutrality in regards to that issue. To the extent Gyles testified as to her observations and interactions with various supervisory staff in the wake of Perry's discharge, I find her descriptions of these encounters to be worthy of credit as they were detailed, specific and find that it would not inure to her benefit to fabricate this testimony.

John Tucci

I find that much of Tucci's testimony is not worthy of belief. I note in particular that it was contradicted by the testimony of other witnesses and the documentary evidence, much of it emanating from the testimony and documentary evidence attributable to Respondent. In this regard, Tucci testified that prior to June 8, he was unaware that Perry had sent an e-mail to Dolan, but that it became part of his preparation for the termination interview. As Tucci testified: "We had a quick conversation. That basically she had written a letter, and Dorothea had struggled with NPS, and her trying to say that NPS wasn't a valid way to measure individuals wasn't a component that should be used. That was really the breadth of it."

I find, based upon the record evidence, which has been outlined above, that Tucci was far more involved in fashioning a rationale for Perry's discharge than he professes. While he testified that prior to June 8 he was unaware that Perry had emailed Dolan or that she was facing potential disciplinary action, inasmuch as he was he was the acting interim director of the facility, such assertions are inherently improbable. Moreover, such testimony is refuted by Panno who testified as to their ongoing consultations as well as the numerous e-mails of which he was a recipient, which have been set forth above.

Tucci's false testimony concerning the scope and nature of his involvement with Respondent's investigation of Perry casts serious doubt on the veracity of his testimony in its entirety and the probity of Respondent's defense more generally.

Anthony Maharaj and Valmiki Mohip

As set forth herein, Supervisors Maharaj and Mohip each testified that they had no knowledge of Perry's union activities. Contrary to these assertions I credit the testimony offered by Perry over their blanket denials, to a certain extent, as has been explained above. Moreover, I fully credit the account offered by Gyles, who provided a full, detailed explanation of relevant events. While her testimony does not conclusively establish that these supervisors knew of Perry's union activities prior to her discharge, it does show that they were aware of these issues shortly thereafter. Moreover, to the extent they denied her account of the conversations and discussions held with Gyles about Perry and her union activities, it calls their credibility generally into serious doubt.¹⁴

¹⁴ Counsels for the General Counsel and the Charging Party have requested that I revisit and reverse my ruling regarding rejection of a purported "WhatsApp" exchange between Perry and Maharaj which may have taken place in or about July, about 1 month after her discharge. I decline to do so. Shortly prior to the inception of the hearing, Respondent served a subpoena on Perry and the Union seeking certain information and at the outset of these proceedings, I attempted to resolve the dispute over the scope of material to be produced in an off the record discussion. I then summarized my ruling on

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Other credibility determinations will be discussed, as applicable, below.

Applicable Legal Standards

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) and (1) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The General Counsel satisfies an initial burden by showing that (1) the employee engaged in protected activity; (2) the employer had knowledge of that activity; and (3) the employer bore animus towards the employee's protected activity. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Unlawful motivation may be demonstrated not only by direct evidence, but by a variety of circumstantial evidence such as timing, disparate or inconsistent treatment, departure from past practice and shifting or pretextual reasons being offered for the action. *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007). If the General Counsel meets its initial burden, the burden of persuasion then shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See, e.g., *Consolidated Bus Transit, Inc.*, supra at 1066; *Pro-Spec Painting*, 339 NLRB at 949. Moreover, if the General Counsel shows that the reasons the employer provides for its action are pretextual—that is, false, or not in fact relied upon—the employer fails to carry its rebuttal burden by definition. *Id.*

Protected Conduct

Under Section 7 of the Act, employees have the right to engage in “concerted activities for the purpose of mutual aid or protection . . .” Applying Section 7 of the Act, the Supreme Court has indicated that “mutual aid or protection” should be liberally construed to protect concerted activities directed at a broad range of employee concerns. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563–568 & fn. 17 (1978). It is axiomatic that protected activity includes employee

the record as follows: “So generally speaking, here is what I expect the Communication Workers of America and Ms. Perry to produce to Respondents. Any audio or visual recordings regarding meetings or discussions with supervisors or management—members of management . . . specifically those listed in paragraph 5 of the complaint in this matter, which were taken during the period from January 2015 to June 8, 2015 [the date of Perry's discharge], and that would include any contemporaneous notes, text messages, emails sent by Ms. Perry . . . [balance of order omitted].”

The above-noted time frame limiting production was established through discussions and in reliance upon the representation by counsels for the General Counsel and the Union that the relevant period for such communications ended on the date of Perry's discharge. The purported “WhatsApp” exchange took place after that date. In this regard, I acknowledge that the existence of a “WhatsApp” exchange was mentioned in passing during our off-the-record discussion, but it was otherwise not discussed. My view is that if counsel for the General Counsel believed it had relevance to the issue of employer knowledge, it should have been produced as, apart from its date, it was otherwise within the scope of my order on the subpoena. In the alternative, to the extent General Counsel seeks to use it to impeach Maharaj's testimony, General Counsel could have at any point requested that I revise my ruling (as I had indicated that I was willing to do as the evidence developed during the course of the hearing) and the document in question could and should have been produced pursuant to the subpoena. In any event, based upon the record, I find the proffered evidence to be of uncertain provenance and, even if credited, not particularly probative given my credibility resolutions as discussed above.

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complaints to their employer regarding their hours, workloads, wages and other terms and conditions of employment.

In order for activity to be considered “concerted” under the Act, it must be engaged with or on the authority of other employees, and not merely on behalf of the acting employee herself. *Myers Industries (Myers I)*, 268 NLRB 493, 497 (1984). This includes circumstances in which an employee seeks “to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Myers Industries (Myers II)*, 281 NLRB 882, 887 (1986). The Act protects those employees who act alone in raising group complaints or in preparing for collective action because in order to “protect concerted activities in full bloom, protection must necessarily be extended to intended, contemplated or even referred to group action, lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.” *NLRB v. Coastal Tool Division*, 262 F.3d 184, 188 (2d Cir. 2001) (quoting *Hugh H. Wilson Corp. v. NLRB* 414 F.2d 1345, 1347 (3d Cir. 1969)).

It is well settled that an individual engages in concerted activity when he expresses grievances to management about a matter of general employee interest. See e.g. *Whittaker Corp.*, 289 NLRB 933 (1988) (employee engaged in concerted activity when, without conferring in advance with fellow employees, he contested the suspension of the customary annual wage increase); *NLRB v. Caval Tool Div.*, 262 F.3d 184, 190 (2d Cir. 2001) (affirming the Board’s holding that an employee engaged in concerted activity when he made statements about the company’s new break policy at an employee meeting).

Respondent has argued that to the extent any protected conduct occurred at the Jericho facility it was extremely limited. In particular, Respondent argues that there was no organizing campaign occurring at the facility in that there was no solicitation of union cards, distribution of literature, demonstrations or picketing on behalf of the Union. Respondent further notes that the testimony of Union Organizer Stern showed that the Union was focusing its organizing efforts at other company facilities in Long Island and not the Jericho location where Perry worked. Respondent argues that Perry’s email to Dolan was the sole arguably protected activity of which Cablevision was aware and that it cannot be a basis upon which to find concerted activity, management knowledge and inferential animus.

Contrary to Respondent, I find that Perry did engage in protected conduct. As an initial matter, I find her email to Dolan to be protected. While there is no dispute that Perry acted alone, and without the knowledge or approval of her coworkers, the email asserted common complaints and concerns relating to performance metrics, supervision and log-in time.¹⁵ I additionally find that the email was concerted in nature as it, at least in part, resulted from Perry’s discussions with her coworkers regarding their concerns about such matters. This was made clear to Dolan when she raised complaints about the reimplementation of the TAHT metric and the impact it would have on “our performance.” Similarly, Perry raised complaints regarding the difficulties “employees” faced regarding the Genesys log-in procedure and that NPS was perceived as unfair by employees. The primary focus of Perry’s email discussed the manner in which Respondent evaluated its employees, what were perceived as unfair management practices and the effects these had on her coworkers. *Myers Industries, Inc. (Myers II)*, supra at 887 (concerted activities include individual employees bringing group concerns to the attention of management.)

¹⁵ I note that in response to Perry’s complaints, Respondent reviewed and issued a memorandum to its employees regarding log-in procedures.

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Thus, in sending this email, Perry was “bringing truly group complaints to the attention” of Dolan, the Company’s CEO. Accordingly, I find that Perry’s email to Dolan furthered common interests among her coworkers. Additionally, it cannot be denied that Perry’s email made explicit reference, on two occasions, to the possibility that employees might seek to unionize, and could (and I think was), fairly read in support of such.

I further credit Perry’s testimony, which was not specifically rebutted by Respondent, that at their meeting on May 18, Perry told Panno that the issues she had raised in her email to Dolan were a reflection of the concerns of her coworkers.

The credited testimony further establishes that Perry engaged in organizing activity on behalf of the Union. Not only did she reach out to Union Organizers Dubnau and Stern, she told coworkers that she had been in contact with the Union, provided contact information to several of them, encouraged employees to attend union meetings and sent emails to various employees regarding the Union’s organizing efforts. She engaged in such activities until the date of her discharge.

Employer Knowledge of Perry’s Concerted, Protected Activities

It cannot reasonably be disputed that Respondent was aware of the contents of Perry’s email to Dolan. Aside from Dolan, the recipient, other senior managers made aware of the email were Hilber, Gillingham, and Panno. Panno, in turn spoke Acting Interim Director Tucci, HR Manager Prochazka and Director of Operations Lopera. Perry’s immediate supervisor Mohip and manager Vega were also aware of this email. Mohip was repeatedly consulted about Perry’s email to Dolan and asked to investigate as to whether others were in the offing. Mohip asked Perry about it, asked her to send him a copy and reminded her that if she did something similar in the future, she should tell Mohip or Vega about it.

To the extent Mohip has denied knowledge of Perry’s union activities prior to her discharge, or thereafter, I do not credit such testimony. As discussed above, his blanket denials are unconvincing in the fact of Gyles’ detailed account.¹⁶ I fully credit the testimony of Gyles who confirmed that, shortly after Perry’s discharge, Mohip repeatedly taunted Gyles about her being “in cohorts” with Perry and the Union and further acknowledged that, to his understanding, this had formed the basis for her discharge.

As I have described above, I credit much of Perry’s testimony that Maharaj was aware of her attempts to contact the Union and assisted her by pointing out employees he thought might be interested in a union. I discredit Maharaj’s blanket denials which were unpersuasive. I additionally credit Gyles’ testimony which establishes that Perry’s union activities were known to various lower-level supervisory staff at the Jericho facility.

In sum, I find that the credible evidence supports the conclusion that both Mohip and Maharaj were aware, as of the time Perry was discharged, that she had not only written to Dolan regarding “whispers of unionization” but that she was planning to take action to bring

¹⁶ Although Respondent argues that Mohip has no motive to present false testimony, as he was discharged and no longer an employee of Cablevision, I note that he was not asked during the hearing where he was currently employed. From this omission, I infer that at the time of the hearing he was seeking employment and relying upon Cablevision for, at the least, a job reference. That implies that he has a motive for tailoring his testimony in favor of his former employer.

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those whispers to fruition. The knowledge of Mohip and Maharaj is imputed to Respondent under applicable Board law. *The Parksite Group*, 354 NLRB 801, 804 fn. 18 (2009) (supervisor's knowledge of union activity is properly imputed to upper-level management where employer does not establish a credible evidentiary basis for rejecting such imputation); see also *State Plaza Hotel*, 347 NLRB 755, 756 (2006); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 fn. 36 (2005) (knowledge imputed unless it is affirmatively established that supervisor with knowledge did not pass the information on to others). Here, Respondent has failed to adduce sufficient evidence to meet that burden.

I additionally infer knowledge from the fact that, by Panno's admission, various members of Respondent's senior management were conducting focus groups with employees so as to assess employee morale. As a result of the feedback they received they concluded, as Panno testified, it was concluded that there were no "whispers of unionization."¹⁷ Certainly then, Perry's email to the Company CEO attesting to the contrary must have been met with some measure of consternation. It is unlikely that Perry's supervisor and possibly other supervisory staff with whom she was friendly would not have been consulted about this matter. The record evidence shows that on May 12, Prochazka reported to Panno what Mohip knew (or did not know) about Perry's intentions to write other such emails to Dolan and told Panno that she had instructed that Mohip must let HR or higher-level management know immediately when such issues arise. Mohip was also directed by his supervisor, Vega, that he must tell Vega when he thinks Perry was going to engage in such conduct. Perry testified that Mohip told her that management had concerns about what she had written to the CEO, testimony which was not specifically denied by Mohip. To presume, as Respondent would have us do, that Perry's message regarding "whispers of unionization" were not part of these discussions among her supervisors strains credulity.

In this regard, I find it telling that, as Panno testified, she told her colleagues that Perry's discharge would be "noisy" because, "it would echo through the organization since many different people were aware of the potential for this particular separation to have some repercussions."

I additionally infer knowledge from the testimony, offered by Gyles, that after Perry's discharge the two computers she most frequently used were removed, and this only had otherwise occurred when there was some sort of malfunction. I note that Respondent offered no testimony to rebut or otherwise explain such assertions.

Animus Toward Perry's Concerted Activities

In arguing that there is a background of union animus toward the CWA, counsel for the General Counsel relies upon the administrative record and Judge Steven Fish's recommended decision in *CSC Holdings, LLC*, Case No. 02-CA-085811, et al. issued on December 4, 2014, and, at the time of this decision, still pending before the Board. As Respondent notes, this trial involved a separate Cablevision facility; the allegations related to activities at the Company's Bronx and Brooklyn locations in 2012 and the collective-bargaining process that ultimately resulted in a contract covering a unit of employees in Brooklyn. Although Judge Fish dismissed certain allegations relating to the bargaining process, he found that Respondent had committed a number of violations of Section 8(a)(1) and unlawfully discharged 22 employees in retaliation for concerted activity. While an argument can be made that this is some indication of a

¹⁷ That may well have been the case prior to Perry's discussions with her coworkers and attempts to involve the Union in organizing the Jericho facility.

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Company-wide attitude toward the CWA, or unions in general, I cannot find it conclusive regarding the issue of animus in this instance.¹⁸ Rather, I find it more appropriate to focus on Respondent's contemporaneous comments, behavior and its treatment of Perry in the immediate aftermath of her email to Dolan and the circumstances attendant to her discharge.

Respondent maintains that there is no credible evidence that any managers expressed union animus, that any of the decision makers were even aware of any organizing activity at the Jericho location or that Perry's "passing reference" to unions in her email to Dolan played any role in the decision to terminate her employment. Respondent argues that the General Counsel's failure of proof of union animus directed at Perry defeats a prima facie case. *C. Overaa & Co.*, 291 NLRB 589, 599 (1988); *Verland*, 296 NLRB 442, 448 (1989); *Hemisphere Broadcasting Corp.* (WBCN), 290 NLRB 394, 402 (1988).

In arguing that the instant record demonstrates evidence of animus, General Counsel relies upon Perry's un rebutted testimony that Panno told her that, in her opinion, unions would not be good for employees because they serve as an impediment between employees and the company, and that even unionized employees were subject to performance metrics. Counsel for the General Counsel acknowledges that Panno's statements represented a lawful expression of Respondent's opposition to unions, but further argues that such comments also constitute probative evidence of animus under Board law. *Mediplex of Stamford*, 334 NLRB 903, 903 (2001) (and cases cited therein) (employer expression of views or opinions against union may be used as background evidence of animus even if it is not a violation in and of itself). In addition, General Counsel points to the facts and circumstances surrounding Perry's discharge, as discussed below.

Contrary to Respondent. I find that a discriminatory motive is demonstrated by any number of factors here. First, there is direct evidence, established by Gyles' credible testimony, that Mohip admitted shortly after Perry's termination that, to his understanding, she was discharged because of her union activity. I further rely upon Gyles' credited testimony that Mohip told fellow Supervisor Cecora that he would not want Gyles on his team because Gyles was "in cohorts" with the Union, clearly indicating that supervisory personnel saw such affiliations as problematic.

In addition, there is sufficient circumstantial evidence here to allow a strong inference of unlawful motive. Among other things, discriminatory motive may be suggested by timing, disparate treatment, expressed hostility toward the protected activity, departure from past practice, pretext, and shifting reasons for the adverse employment action. See *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007).

I find that the speed and nature of Respondent's investigation of Perry's personnel record indicates animus. Respondent's inquiry began virtually within minutes of Dolan's receipt of Perry's email and was exhaustive as to her conduct, work history, attendance, performance, and her requests for medical leave and accommodation. Management even took pains to document such trivial matters such as Perry's complaints about the food at a company event. Aside from Perry's nonspecific complaints about arbitrary supervision, which Panno found to be

¹⁸ In its posthearing brief, Respondent cites several cases where the Board has concluded that events occurring at different location, involving employees in different job categories and taking place years prior to the conduct currently alleged as unlawful has not been found to be determinative. See e.g. *Earthgrains Co.*, 338 NLRB, 845, 853; *Sunland Construction Co.*, 307 NLRB 1036 (1992); *Advertisers Mfrs. Co.*, 275 NLRB 100 (1985).

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unsubstantiated, none of these issues were implicated in the email Perry sent to Dolan. Moreover, other than offering vague testimony that such “escalation summaries” were standard procedure, no Company official testified as to why an investigation into such matters was necessary, warranted or helpful in resolving the issues raised by Perry in her email to Dolan.

5 Thus, Respondent has failed to make a credible affirmative defense that Respondent’s exhumation of Perry’s employment history was a routine response in instances where an employee has availed itself of Respondent’s professed “Open Door” policy.

10 I further note that there is no evidence that any management official involved in the decision to discharge Perry took note of her favorable performance reviews for the prior years. Rather, Cablevision management sought to uncover and document every possible shortcoming in her performance. In this regard, the Board has long held that an employee’s misconduct discovered during an investigation undertaken because of an employee’s protected activity does not render a discharge lawful. *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 1998 (and cases cited

15 therein).

Disparate Treatment and Evidence of Pretext

20 In furtherance of the argument that there is an absence of evidence of animus, Respondent argues that there is no evidence that the reasons proffered for Perry’s discharge suggest pretext. As Respondent argues, Perry received counseling regarding her poor NPS performance and that, beginning in February 2015, Mohip spoke with her regarding this during one-on-one meetings and coaching sessions. She was encouraged to go to training sessions on NPS. Mohip additionally testified he advised employees generally that their poor performance

25 on required metrics could lead to their termination.

30 In rebuttal to General Counsel’s apparent argument that Respondent terminated Perry in contravention of its progressive discipline protocol, Respondent argues that Cablevision has no policy mandating the use of specified steps of progressive discipline in all cases. Respondent maintains that the Company policy, as set forth in the employee handbook, expressly provides that, “the Company may take corrective action up to and including termination of employment without prior corrective action where, for example, there are serious infractions of company policies of if the Company believes that additional corrective action is unlikely to resolve the problem.” Respondent relies upon the fact that Perry did, in fact, receive counseling, as noted

35 above. Given Perry’s “repeated outright rejection of the NPS system and refusal to undertake offered training,” it is argued that further corrective action would be “unlikely to resolve the problem.” Respondent maintains that this is a legitimate judgment and not remotely indicative of pretext.

40 Respondent further argues that General Counsel’s contention that Perry was treated disparately from other employees who were terminated after receiving more extensive formal discipline is not supported by the evidence. In particular, it is contended that the examples cited as support for this proposition are inapposite. As Respondent maintains, Perry was terminated for a “unique combination” of her expressed unwillingness to abide by Cablevision’s

45 performance metrics and her poor performance scores. She was not terminated solely for performance, as were certain other employees, who may have been given warnings or performance improvement plans. Respondent further maintains that it retains the right to terminate employees without a rigid policy of progressive discipline, at will and with or without warning. In this regard, Respondent relies upon *New Otani Hotel and Garden*, 325 NLRB 928, 941–942 (1998) (“Absent independent proof of the employer’s anti-union animus, even evidence

50 of actual conscious disparity of treatment by an employer or its agents when it comes to rule-enforcement is generally not a reasonable basis for inferring that the employer’s enforcement of

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the rule in a given instance against an employee who has engaged in union activities known to the employer was motivated in any way by the employee's union activities. There are simply too many other explanations for such phenomena that do not raise concerns under the Act.")

5 Regarding pretext, the Board has held that where the evidence establishes that the reasons given for the respondent's actions are pretextual—that is, either false or not in fact relied upon—the respondent fails by definition to show that it would have taken the same action for those reasons absent the protected conduct, and thus here is no need to perform the second part of the Wright Line analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). In addition, pretext can and is frequently viewed as evidence of animus toward protected conduct. *Real Foods*, supra. Here, I find that the evidence proffered by Respondent suggests pretext, which at the very least constitutes further evidence of discriminatory motive.

15 Counsel for the General Counsel argues that the stated basis for Perry's discharge is belied by the record evidence. For example, General Counsel points to the investigation immediately undertaken by Cablevision into Perry's work record as being in contravention to its own stated "Open Door" policy, which expressly prohibits retaliation against an employee who raises concerns to management. General Counsel maintains that Respondent failed to adduce evidence that Respondent had similarly investigated, or prepared "escalation summaries" of other employees who had similarly availed themselves of this option or raised concerns to Dolan.

25 General Counsel additionally relies upon what it contends is an apparent departure from the disciplinary policy set forth in its employee handbook, which sets out a progressive discipline protocol and argues that this provides strong evidence of pretext. *Bohn Heat Transfer Group*, 267 NLRB 369, 373 (1983).

30 Counsel for the General Counsel contends that Respondent's attempts to portray Perry a poor performer, who resisted the Company's efforts to train her on NPS is belied by the evidence which shows that Perry's statistics were actually improving in the weeks leading up to her discharge. General Counsel points to the fact that on June 9, the day after Perry's discharge, Respondent removed her name from a "Monthly Recognition –VoV" list of employees who had received perfect scores from customers on VoC surveys during the month of May. General Counsel argues that the failure to consider this documented improvement in Perry's metrics is evidence of pretext and of discriminatory motive.

40 As has been noted above, the coaching notes, excerpted above, were not authenticated by Mohip, but rather by Tucci. General Counsel has argued that they are therefore unreliable hearsay and requests that I draw an adverse inference from the fact that Respondent failed to adduce testimony from Mohip about what he actually discussed with Perry regarding her performance. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (drawing adverse inference against a party for failing to call a witness to testify about a material fact where the witness was reasonably "assumed to be favorably disposed to that party"). As discussed above, I find that Mohip's failure to authenticate or discuss these notes in his testimony raises questions as to their veracity sufficient for me to credit Perry's testimony about the nature of their discussions as to her performance and any perceived deficiencies.

50 Counsel for the General Counsel further notes Panno's admission that when she met with Perry on May 18, she did not advise her that there were any problems with her performance or that such issues might lead to her discharge. Thus, it is argued, there is no reliable evidence that Perry was ever warned about her NPS performance.

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Based upon the foregoing, I find that the General Counsel has established a prima facie case that Perry's concerted, protected and union activities were a substantial or motivating cause of her discharge. The burden now shifts to the Respondent to show, by a preponderance of credible, reliable evidence, that it would have discharged Perry notwithstanding her protected conduct. Based upon the evidence I find that Respondent has failed to meet this burden.

Respondent's Asserted Defense: Perry's Lack of "Skill" and "Will"

As an initial matter, it is not clear who really made the decision to terminate Perry. While Panno testified that it was Gillingham's decision, Gillingham in turn testified that the decision was a result of a consensus, which Panno echoed in subsequent testimony. While this may seem a trivial matter, standing alone, given the context of various actions taken by Respondent's management, it has some significance. And, I infer unlawful motive from Tucci's disingenuous testimony about his role in investigating Perry and various aspects of her performance.

Perry was discharged, as Panno testified, due to her substandard NPS performance and the fact that she demonstrated an unwillingness to attend training or focus groups to improve. It should be noted that, by May 18, when the two met, the "escalation summary" as to Perry had been undertaken, and her employment history was under review. While Panno may have suggested that Perry attend focus groups during their meeting on May 18, there is nothing in the record to indicate that Perry's performance was an issue or discussed at that meeting. Rather, the issue of focus groups was raised in response to Perry's complaints that NPS was an unfair metric. During that meeting, Panno also stated that she viewed Perry as a "leader" and opined "you get it." She certainly did not do anything at that time to provide Perry with constructive or other forms of criticism or indicate to Perry that her job was in jeopardy.

There is no evidence of any insubordination on Perry's part in terms of defying instructions or orders to attend training sessions on NPS or any other metric. Moreover, there is no evidence that she was rude or otherwise inappropriate with customers. Perry's prior evaluations made note of her patience and effective communications with customers. I further note that Mohip had noted that Perry was receptive to coaching.

With regards to Perry's overall proficiency at her job, the record shows that she was considered by Respondent to have been an able performer. As set forth above, she had performance reviews in 2013 and 2014 that were favorable. She ranked among her peers in most of the Company's metrics and in her overall scores.

While Perry's NPS scores were admittedly below average, evidence adduced by the General Counsel shows that Perry's NPS scores had been improving in the 3 months immediately preceding her discharge, and she was scheduled to receive a commendation in June. Respondent failed to rebut or even address this issue either through testimonial or documentary evidence.

In addition, there is evidence of disparate treatment in that other employees who performed poorly were typically put on action plans to improve their performance. As noted above, during the 18-month period preceding Perry's discharge the vast majority of employees discharged for unsatisfactory performance were subject to prior discipline or performance improvement plans. Such plans typically included those areas where the employee needed to improve their performance and provided the employee with recommendations as to how to do so. As Respondent's progressive discipline system illustrates, poor performance may lead to

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coaching, corrective action and eventually termination. Unlike other employees, Perry was not afforded the opportunity to improve her performance prior to her termination.

Notably, during Perry's termination meeting, Tucci advised Perry that she was being terminated because she did not "believe in the direction of the company."¹⁹ In this regard, it must be remembered that Perry was a part-time, evening-shift employee. Her belief in the "direction of the company" would seem to be of little consequence if she showed up for work as scheduled and met the expectations required of her. In fact, during her prior year-end evaluation, Mohip wrote that Perry had been a "valuable contributor" who demonstrated "a firm grasp of her job" and "strives for ways to improve her performance and be more productive," among other things.

While Perry's performance may not have been exemplary, there were any number of employees whose metrics scored below hers, who were (as far as the record demonstrates) neither disciplined nor discharged. What distinguished Perry from the remainder of this group was that she had the audacity to email CEO Dolan that Respondent's method of evaluating employees was unfair to them and that there were "whispers of unionization" at the Jericho call center, among other things.

For the foregoing reasons, I find that Respondent has not met its burden, under *Wright Line*, of proving that Perry would have been discharged for reasons unrelated to her concerted, protected and union activities and conclude, accordingly, that her discharge was in violation of Section 8(a)(1) and (3) of the Act.

Issues Relating to a Reinstatement Remedy

Respondent has argued that, notwithstanding any finding on the lawfulness of Perry's discharge, she is ineligible for reinstatement for two reasons: the falsification of her employment application and her willful violation of a sequestration order imposed by me at the outset of the hearing in this matter. I will address this latter point first.

Respondent points to an October 1, 2015 email which, it is contended, constitutes an overt effort to intimidate witnesses and compromise the integrity of the Board's processes. In that email to certain of her former coworkers, Perry identified Maharaj and Cecora, both first-level supervisors, as anticipated witnesses for Cablevision based upon her apparent observation at the Board's offices as they were waiting to testify on behalf of the Company on September 30. As Perry emailed:

For the record, I am disclosing the name of the UNNAMED supervisor who reversed his position, and that means he reversed his position on those that thought they could trust him. DO NOT trust Anthony Maharaj. He introduced me to several technicians that were interested in getting [a] union for Cablevision. You still trust him? This is the man that told me how much he admired me for my strength. Look at him now. This is the man that knows the names of some of the people on BCC. I wonder if he's ratting y'al out now? My communication with fellow employees is protected which means I am under no duty to produce communications or names. He has a duty to report those of you who are interested in unions, requested union material or attended union meetings.

¹⁹ I note that Perry's testimony in this regard was not rebutted by either Tucci or Panno.

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The other company witness is [Reneiro].²⁰

Welcome to the real world. Be careful who you call your friends.²¹

Respondent contends that, in sending this email, Perry sought to place Maharaj and Cecora in a negative light among their coworkers and those whom they directly supervise and thereby influence them, or any future witness, to change or moderate their testimony. In support of the foregoing contentions, Respondent relies upon *Lear-Siegler Management Service Corp.*, 306 NLRB 393 (1990).

The evidence fails to show that Perry sent the above email to Maharaj, Cecora, or any other of Respondent's witnesses in this proceeding. None of Respondent's witnesses testified that they received, or even knew of the existence of this email, or that any of the employees of Cablevision discussed this matter with them.

In *Lear-Siegler*, supra, the Board declined to order reinstatement and backpay, despite a finding of unlawful discharge, because the discriminatee threatened to cause a witness with the potential of jail time by reporting a violation of the terms of the witness' probation, with the apparent objective of influencing his testimony. Contrary to Respondent, I find that Perry's conduct did not rise to the level of the threat therein. Her email was apparently directed to non-witnesses in this matter, and there is no evidence that the named supervisors or anyone else who did offer testimony were affected in any manner. Thus her apparent violation of the sequestration order was technical and nonprejudicial. See e.g. *Oster Specialty Products*, 315 NLRB 67, 72 (1982); *Conair Corp.*, 261 NLRB 1189, 1207 fn. 23 (1982), enf. granted in part and denied in part, on other grounds, 721 F.2d 1355 (D.C. Cir. 1983). Accordingly, I fail to find this a basis upon which to deny reinstatement.

Respondent further contends that Perry is ineligible for reinstatement based upon certain omissions or misrepresentations she made on her employment application when she sought to convert from temporary to permanent employment with Cablevision.

In support of the foregoing contentions, Respondent adduced the testimony of Severo Mancebo, currently employed as a senior recruiter for Cablevision. He worked in this capacity in 2004, at the time Perry was transitioned from being a temporary employee employed by Spherion to her current position. There were four individuals in the department at that time handling such matters: Mancebo, Director Paul Argolopoulous, HR Manager Karen Terlizzi, and Staffing Coordinator Scott Rosinger.

As Mancebo testified, individuals were identified by Cablevision based upon performance and a request would be submitted to convert them from temporary to full-time. The employee would complete an application and would be given a preemployment drug test. As Mancebo testified, "whether or not they made the conversion was based on the results of the background check and the pre-employment drug test." There was no interview involved because the employee was already in the position and the decision to hire them was based on demonstrated performance.

²⁰ I further note that this email, supplied by Respondent, provides further support for Perry's claim that Maharaj was a supporter of her efforts to provide information regarding the Union to employees.

²¹ Perry's email to her coworkers were not made a part of the formal record during these proceedings, but were attached to a motion made by Respondent to strike her testimony in its entirety, a motion which I denied. Respondent thereafter sought to supplement the record and correct the transcript, a motion which I have granted. Perry's email is incorporated into the record by virtue of this motion.

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The employment application as completed by Perry states:

5 I certify that answers given herein are true and complete to the best of my knowledge. I understand that any false or misleading information given b or any material omissions made by me in my Application, during interview(s), or in the Company's pre-employment screening process, may result in my not being hired or later discharged.

10 The section of the application where the applicant is required to provide information regarding previous employment states:

15 EMPLOYMENT HISTORY (begin with the most recent position). List all employment for the past seven years and explain any gaps in such employment. . . You may exclude affiliations or volunteer work which might indicate race, religion, religious creed, color, age, sexual orientation, national origin, marital status, gender, ancestry, disability or handicap, veteran status or any other classification protected by federal, state or local law.

20 In her application, when asked for the reason for leaving her former employment with Collegis, Inc., Perry stated that the reason was "reorganization." Moreover, Perry omitted her then-current (and ongoing) employment with the New York City Department of Information Technology and Telecommunications (DoITT). Respondent argues that under Board law any obligation for reinstatement and backpay ended when it became aware of these matters, which it asserts was in the course of trial preparation.

25 Mancebo testified that he was involved in the process of converting Perry from a Spherion temporary employee to one employed by Cablevision. As part of this process a research analyst named Jennifer Lopez from Cablevision Intelligence Services conducted an investigation (called a modified preemployment screening) into various aspects of Perry's employment history. She then submitted a report on July 20, 2004, to Mancebo, with a copy to Rosinger. The report noted that Perry was a current Spherion temporary employee and stated: "we have verified employment with Collegis/NY Law School. The candidate was an employee of NY Law School from 4/2/90-11/1/97 as a PC Technician. She was then employed through Collegis from 11/97-10/02. The report further noted that there was a "[G]ap in employment 02-04" and that there was "[N]o negative or derogatory information found via news/media." Lopez additionally certified that the Company had investigated past employment verification, address and social security number verification information, a criminal history review, a public records search, and a search of news media articles. Mancebo acknowledged that he was "not altogether" familiar with the manner in which the team, of which Lopez was a member, went about investigating the cases referred to them.

45 Mancebo testified that Perry never disclosed that aspects of her employment application were untrue, and if such information had come to his attention he would have expected to be made aware of it. In such an event, "the process was to have the employee either correct the application or complete a new one." In addition, if information that a false reason for leaving a prior job had been noted by the applicant, the matter would have been escalated to Argolopolous.

50 Perry testified that it was her belief that she was discharged from her employment with Collegis because she reported to law enforcement authorities that a professor at the law school where she worked stored child pornography on his computer. Collegis claimed that it discharged her for poor job performance. Perry testified that she discussed these circumstances, as well as

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the fact that she already had full-time employment elsewhere with Terlizzi. It is also the case that Perry had by then initiated a wrongful termination lawsuit against her former employer.²²

In support of its contentions that the omissions and false information provided by Perry would have constituted grounds for termination, had they been known at the time, Respondent sought to introduce into evidence the employment applications of other employees who were terminated for misrepresentation of their employment applications. Counsel for the General Counsel objected to the admission of this evidence and I placed the material in a rejected exhibit file. Upon further reflection, I deem it appropriate to consider this evidence and therefore reverse my ruling in this regard. In part, I do so because, notwithstanding his stated objection, counsel for the General Counsel has chosen to rely upon this evidence in his posthearing brief.

In one instance the employee in question was discharged after it was discovered that she had checked "no" when asked as to whether she had any criminal convictions. In fact, there were prior convictions of Petit Larceny and Grand Larceny 4th degree. In addition an investigation revealed various alleged pending offenses involving the operation of a motor vehicle and endangering the welfare of a child. In addition the employee had received 5 warnings in the immediately preceding 3-year period.

Similarly, another employee had not disclosed multiple convictions ranging from the year 1994 prior to his hire in 2007. When this matter was discovered in 2013, the employee was discharged. Another employee, who applied for an internal promotion failed to disclose a misdemeanor. There was little other detail in the document as produced by Respondent.

These documents, which are now in evidence, show that Panno was involved in all three discharge decisions.²³ Her testimony in this regard is that each document package was a request for discharge of the employee in question for falsification of application. Panno additionally testified as follows:

Q: [by Respondent's counsel] And at some point did you come to learn - - well, first of all let me ask you this: do you consider the reason for leaving a prior position to be an important question on an employment application?

A: Definitely

Q. Why do you consider it to be important?

A. It's a key basis for when we make hiring decisions.

Q: Now at some point did you become aware of the facts suggesting that the reason for leaving, reorganization, on Ms. Perry's employment application were not true?

A: Yes.

Q: And when approximately did you become aware of that?

A: In the course of preparing for this litigation.

O: And did you see certain documents at that time, suggesting that the reason for leaving prior employment of reorganization was not true?

A: Yes

[At this point counsel for the Charging Party reiterated a prior objection, and I noted that she had a standing objection to this line of questioning.]

Panno testified that one of the documents she reviewed in connection with her

²² Respondent asserts that Terlizzi was unavailable as a witness to rebut Perry's testimony in this regard as she is no longer employed by Cablevision, but it failed to establish that it made any efforts to locate her or secure her testimony.

²³ One document, sent by attorney Noel to Panno characterizes it as "Attorney Client Privileged."

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preparation for the instant litigation was a letter from Collegis stating the reason for Perry's separation from the company. Panno also had occasion to review documents related to Perry's lawsuit for unlawful termination, which let her to believe that Perry's representation on her employment application that she had been discharged due to "reorganization" was false. It is undisputed that Perry additionally failed to disclose her then-current and ongoing employment with DoITT.

Other than the three disciplinary actions described above, Panno did not testify to any adverse action taken by Cablevision regarding false information or misrepresentations made by employees on their employment applications.

In support of its contentions that Perry should be denied reinstatement as well as a limited backpay remedy, Respondent relies primarily upon *John Cuneo, Inc.*, 298 NLRB 856 (1990). In that case the Board held that if an employer establishes that an employee would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct. The Board in that case made clear that "in limiting the backpay rights of a discriminatee, the burden of proof is on the employer to establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." 298 NLRB 857 fn. 7. In that same footnote the Board additionally referred to its holding in *Axelson, Inc.*, 285 NLRB 862 (1987), where it stated that, "the Board held that backpay rights will not be automatically barred based on an employee's misconduct that the respondent learns of during the backpay period. Rather the Board held that 'we will limit backpay rights by cutting them off at the time the employer acquired knowledge of the misconduct *if it demonstrates* that the misconduct . . . is not conduct of a sort that it has tolerated in the past' 285 NLRB at 866" (emphasis added in the original). In *Cuneo*, supra the Board also stated that, "[b]ecause it is the Respondent's burden to establish evidence mitigating its liability we construe the available evidence in a manner that is most favorable to the discriminatee." 298 NLRB 857 fn. 8.

As an initial matter, Respondent contends that Perry's assertions of having the discussed the circumstances of her leaving Collegis with Terlizzi are not worthy of credit. Respondent points to the following testimony:

Q: [by Respondent counsel]: And did you mention to [Terlizzi] something about your Collegis employment and the circumstances under which you left?

A: I believe so. It was a public case. Anybody could have seen the information. It was on the news.

Respondent notes that during her rebuttal testimony, Perry was far more definitive in describing her interactions with Terlizzi, and argues that such testimony should not be credited.

Respondent further contends that such testimony could not be true as Mancebo was the only employee who handled Perry's application. These assertions are belied by the testimony and documentary evidence which show that Mancebo had no contact with Collegis: rather, that task was delegated to the investigatory unit who reported to him. Thus Mancebo's testimony regarding the extent of communications between his unit and others is uncorroborated hearsay. I further find that Respondent failed to provide a basis upon which I could conclude that Mancebo's recollection of events occurring some 12 previously is reliable, particularly in light of

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the numerous employment applications he has processed during the ensuing years.²⁴

I credit Perry's testimony that she spoke either formally or otherwise with Terlizzi about the circumstances under which she left Collegis. It was apparent from Perry's testimony that she was proud of her role in exposing the professor's viewing of child pornography on his work computer, that she felt she had been unjustly terminated and thereafter sought legal remedies for her discharge. This does not obviate the fact, however, that she did not state this reason on her employment application. It is fair to say, however, that Perry was placed in a dilemma at the time: she had a belief that she was unjustly discharged while her employer stated it was for cause.²⁵ While Respondent argues that a discharge for "poor performance" would "surely disqualify him/her from being hired," such a contention misses the obvious fact that Perry had been referred for permanent employment precisely because of her performance at Cablevision and the Company's apparent satisfaction with it.

Respondent has failed to adduce sufficient evidence for me to conclude that it has met its burden to show that the statements or omissions on Perry's employment application constitute the sort of misconduct it has not tolerated in the past. There is no evidence to show that any employee was discharged for the reasons asserted here. The evidence adduced by Respondent on this issue, which shows that employees were discharged for lying about past criminal convictions or pending matters, is not comparable. Respondent advances the argument that Perry's misconduct was, if anything, more serious than that of other employees who were terminated for failing to disclose a criminal conviction. I cannot accept that premise. After all, Respondent's employees have access to customer names, phone numbers and billing information. A proclivity toward criminal activity would seem to be of substantial significance in such instances. Respondent has failed to show that it has discharged any other employee for reasons similar to those it ascribes to Perry.

Simply put, Respondent failed to adduce through the testimony of Panno, its HR manager, or any other witness evidence sufficient to meet its burden of proof to deny Perry the full range of Board remedies available to her as a consequence of her unlawful discharge.

Conclusions of Law

1. Respondent CSC Holdings, LLC and Cablevision Systems Corp., collectively referred to as Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging and refusing to reinstate Dorothea Perry, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully discharged Perry, I

²⁴ Mancebo testified that he processed approximately 50 such applications per year between 2003 and 2009.

²⁵ I note that Perry's termination letter does not state any specific reason for her discharge other than "poor performance" and does not reference any prior discipline.

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shall order Respondent to offer her full reinstatement to her former position, of if such a position no longer exists, to a substantially equivalent position, without prejudice or her seniority or any other rights or privileges previously enjoyed. Respondent shall also be ordered to make Perry whole for any loss of earnings and other benefits suffered as a result of its discrimination against her.

Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, Respondent must compensate Perry for the adverse tax consequences, if any, of receiving a lump-sum backpay award and is ordered to file a report with the Regional Director, Region 29 allocating the backpay award to the appropriate calendar quarters. *Don Chavas LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014); *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). Respondent will also be ordered to remove from its files any reference to Perry's unlawful discharge, and to notify her in writing that this has been done and the discharge will not be used against her in any way.²⁶

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

The Respondent, CSC Holdings LLC and Cablevisions Systems Corp., Jericho, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for concerted, protected, or union activities

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Dorothea Perry full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to those rights and privileges previously enjoyed.

²⁶ Counsel for the General Counsel requests that the order in this case should include a requirement that Perry be reimbursed for search-for-work and work-related expenses without regard as to whether interim earnings are in excess of these expenses. Normally, such expenses are considered an offset to interim earnings. The General Counsel apparently seeks a change in existing rules regarding such expenses. This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order.

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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(b) Make Perry whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Perry for the adverse tax consequences if any, of receiving a lump sum backpay award, and file a report with the Regional Director, Region 29, allocating the backpay award to the appropriate calendar quarters.

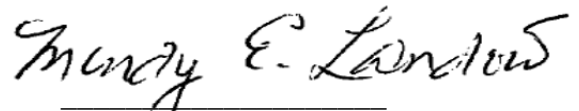
(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Perry in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Jericho, New York copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 20, 2016



Mindy E. Landow
Administrative Law Judge

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in concerted, protected, or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, offer Dorothea Perry full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Dorothea Perry whole for loss of earnings and other benefits resulting from her discharge, less any let interim earnings, plus interest.

WE WILL compensate Dorothea Perry for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file a report with the Regional Director, Region 29 allocating the backpay award to the appropriate calendar quarter.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Dorothea Perry, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CSC HOLDINGS, LLC, and
CABLEVISION SYSTEMS CORPORATION

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

JD(NY)-15-16

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Two MetroTech Center (North), Jay Street and Myrtle Avenue, 5th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/29-CA-154544 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully submitted,

s/ Jamison F. Grella
Attorney

Dated at Washington, D.C.
This 10th day of June 2016